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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 48

PACIFIC STATES BOX AND BASKET COMPANY,
APPELLANT,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE
FOR THE STATE OF OREGON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON

FILED MAY 9, 1935.

SUPREME COURT OF THE UNITED STATES

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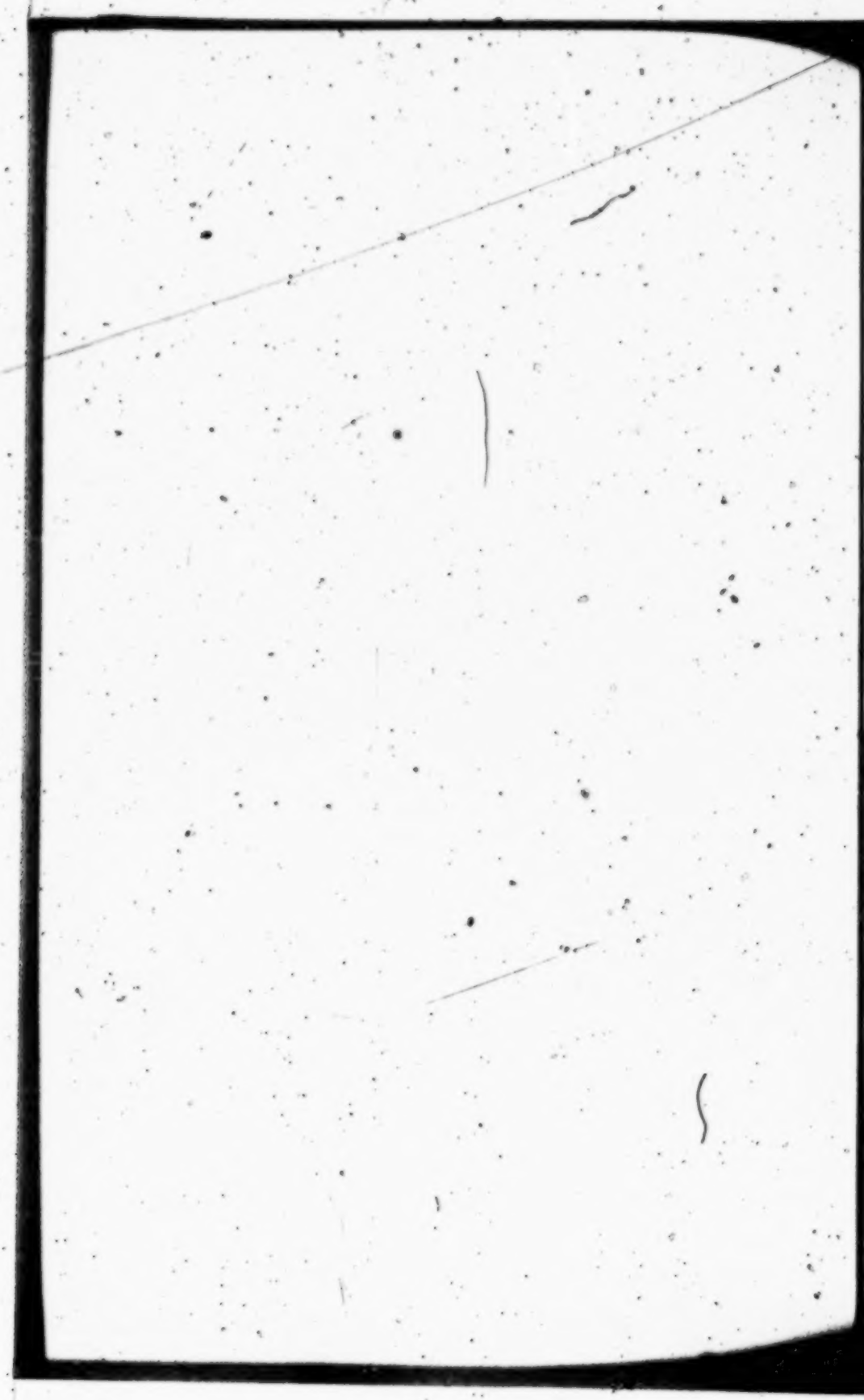
JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1935.

—6554-C



[fols. a & 1-4] Citation in usual form showing service on Willis S. Moore, filed March 23, 1935, omitted in printing.

[fol. 5]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. E-9443

In Equity

PACIFIC STATES BOX AND BASKET COMPANY, a California Corporation, Plaintiff,

vs.

MAX GEHLHAR as Director of Agriculture for the State of Oregon, and CHAS. A. COLE as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, Defendants

AMENDED BILL OF COMPLAINT—Filed June 28, 1934

Comes now Plaintiff above named and by consent of Defendants, herewith files its Amended Bill of Complaint and for cause of suit against the Defendant Max Gehlhar as Director of Agriculture for the State of Oregon, and Defendant Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, complains and alleges as follows:

I

Plaintiff herein, Pacific States Box and Basket Company, now is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, and is a citizen of the State of California. Plaintiff is engaged in the business of manufacturing and selling fruit and vegetable boxes, baskets and cups and is the owner and operator of three plants, one known as the Florin Basket plant, located at Florin, California, one known as the Los Angeles Basket plant, located in Los Angeles, California, and one known as the Weston Basket and Barrel plant, located in San Francisco, California.

II

Defendant Max Gehlhar is the duly appointed, qualified and acting Director of Agriculture of the State of Oregon, and as such is vested with authority to perform the duties of said office as described in Chapter 136 Oregon Laws of 1931, and acts amendatory thereof, and said Defendant Max Gehlhar is the official of the State of Oregon referred to as "the director" and is the official charged with the enforcement of the orders and regulations of the Oregon State Department of Agriculture, and said Defendant Max Gehlhar is a citizen and a resident of the State of Oregon. [fol. 6] Defendant Chas. A. Cole is the duly appointed, qualified and acting Division Chief of the Division of Plant Industry of the State Department of Agriculture of the State of Oregon and as such is charged with making certain orders and regulations affecting standard containers for fruits and vegetables, which orders and regulations are subject to the approval of Defendant Max Gehlhar as Director of Agriculture. That Defendant Chas. A. Cole is a citizen and resident of the State of Oregon.

III

This is a suit of a civil nature, in equity, and is brought to enjoin the enforcement of a certain order or regulation dated May 3, 1933, entitled "Standard Containers for Fruits and Vegetables" made by Defendant Chas. A. Cole in his capacity as Chief of the Division of Plant Industry and approved by Defendant Gehlhar as Director of Agriculture, insofar as said order or regulation relates to containers for strawberries and raspberries, a copy of said order being attached hereto and made a part hereof as Exhibit A; and to enjoin the enforcement of a certain order or regulation dated June 1, 1933, entitled "Oregon Standards for Strawberries (1933)" made by Defendant Chas. A. Cole in his capacity as Chief of the Division of Plant Industry and approved by Defendant Gehlhar as Director of Agriculture, insofar as said order or regulation relates to containers for strawberries, a copy of said order being attached hereto and made a part hereof as Exhibit B, and to enjoin the enforcement of Sec. 18-2902 and Sec. 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sections purport to sustain the above mentioned orders, Exhibit A and Exhibit B, and make the vio-

lation thereof unlawful and punishable, and, as more particularly hereinafter set forth, this suit arises under the Constitution and the laws of the United States, and the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

IV

That Section 18-2902, Oregon Code of 1930, provides as follows: "In order to promote, protect, further and develop the horticultural interests of this state, the Board is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to [fol. 7] change any of them from time to time." The Board referred to in said Section was the Oregon State Board of Horticulture. That Section 18-2911 of said 29th Chapter of Title 18 of Oregon Laws of 1930 provides among other things as follows: "Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a container, any such horticultural product to which the standard is applicable, unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act. * * * Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or be imprisoned not more than one year or both." That under the provisions of Chapter 136 Oregon Laws of 1931, all of the functions of the Oregon State Board of Horticulture were taken over by the State Department of Agriculture which department, it is provided, shall be under the control of an executive officer to be known as Director of Agriculture and the Defendant Max Gehlhar now is said Director of Agriculture for the State of Oregon. That Section 225 of Oregon Laws of 1933 relates to the labeling and packing of fruits and other horticultural products and to their containers. Sub-division 1 of Section 1 of said Act defines packing as meaning placing of fruits, vegetables and/or other horticultural products in a container preparatory for moving, offering for sale or

selling. Sub-section 2 of Section 1 defines the word "Container" but does not define nor use the word "hallock". Section 3 of said Act provides that it shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the State of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the State of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed in conformity with such grades and regulations. Section 8 of such Act provides that a person, firm or corporation who violates the act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by fine or imprisonment, or both.

V

That under the assumed and alleged authority of the above statutory provisions, the orders and regulations hereinabove referred to, which are attached hereto and made a part hereof as Exhibit A and Exhibit B, were promulgated [fol. 8] by Defendant Chas. A. Cole in his official capacity as hereinabove mentioned, and approved by Defendant Max Gehlhar in his official capacity as hereinabove mentioned, and said Defendants have taken steps to enforce said orders, at least insofar as raspberries and strawberries are concerned, and have warned Oregon dealers not to use the tin top cup or basket which is the type of container manufactured and sold by Plaintiff, and have advised Plaintiff that such cups or baskets are not legal in Oregon.

VI

Plaintiff now is and for many years has been engaged in the business of manufacturing in the State of California containers for strawberries and raspberries called tin or metal top cups or baskets. Said cups or baskets are made of two thin strips of wood crossing each other to form the bottom of the containers and then bent upward to form the sides, reinforced with a narrow metal strip at the top to insure protection of the basket and its contents, as well as to insure uniformity of cubic measure. That said basket is made with an opening at each of the four corners so that the berries contained therein are amply ventilated, thus tending to prevent the berries from decaying and allowing the pur-

chaser to see the contents. That said baskets or cups manufactured by the Plaintiff do not have a false, raised, or set-up bottom. That the cubic measure of the baskets made by Plaintiff is one pint and is at least as great as that of the so-called hallock as described in the orders Exhibit A and Exhibit B as they relate to strawberries and raspberries, although the dimensions of the baskets or cups made by Plaintiff differ from the dimensions set out in the orders Exhibit A and Exhibit B. That the manner of packing strawberries and raspberries in metal top baskets or cups as described above is conducive to the preservation of the berries contained therein, to honest measurements, and to fair dealing with purchasers.

VII

That for the past nine years, Plaintiff has sold strawberry and raspberry baskets or cups of its own manufacture, and as described above, to dealers in the State of Oregon, in large quantities, for ultimate use as containers for strawberries and raspberries; that such berry baskets or cups are commonly known as tin-top berry baskets or cups, by reason of their being bound at the top with a metal frame, and such baskets or cups are in general and common use throughout the United States. That the right to continue to sell such tin-top berry baskets or cups to dealers in [fol. 9] the State of Oregon is of great value to Plaintiff, far exceeding in amount the sum of $3,000.00. That Plaintiff also sold a very large number of said baskets or cups to dealers in California for packing strawberries and raspberries for sale in Oregon.

VIII

That notwithstanding the facts above alleged, on or about May 3, 1933, the said order establishing Standard Containers for fruits and vegetables, Exhibit A hereof, was made and promulgated by Defendant Chas. A. Cole in his official capacity and approved by Defendant Max Gehlhar as Director of Agriculture and on or about June 1, 1933, the said order establishing Oregon standards for strawberries, Exhibit B hereof, was made and promulgated by Defendant Chas. A. Cole in his official capacity, and approved by Defendant Max Gehlhar as Director of Agriculture. Said orders were made and promulgated arbitrarily, capri-

ciously and unlawfully in that said orders limit the type of strawberry containers to so-called hallocks 2½ by 4⅜ by 4⅜ inches, outside measurements, bottom of hallock set up ¾ inch, inside depth 1¾ inches, and limit the type of raspberry containers to so-called hallocks 2 by 5¼ by 5¼ inches, outside measurements, bottom set up ¾ inch, inside depth 1¼ inches; that said orders and regulations exclude any other type of cup or container for strawberries or raspberries, even though other types of containers or cups may contain the same amount of berries and provide the same or better protection for said fruit. That the effect of said orders is to prevent the sale by Plaintiff and other manufacturers of the metal top variety of containers or cups with the solid bottom, even though said baskets or cups have at least as great cubic measure as the containers specified in the orders or regulations set forth as Exhibit A and Exhibit B hereof. That the machinery of Plaintiff cannot manufacture the type of baskets or hallocks described in the above mentioned orders without expensive change. That the so-called "hallock" can only be made of spruce which is grown only in the Pacific Northwest. That the so-called hallock described in said orders Exhibit A and Exhibit B hereof is not the type of berry basket in general use throughout the United States, nor are the particular dimensions stated in the orders or regulations, Exhibit A and Exhibit B, recognized as generally standard. That there is no necessity for the particular orders relating to strawberries or raspberries as set forth in Exhibit A and Exhibit B based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police [fol. 10] power, and the particular container described as a hallock of the size and kind provided for strawberries and raspberries in said orders Exhibit A and Exhibit B does not of necessity promote, protect, further or develop the horticultural interests of the State of Oregon. That the term "hallock" is not generally known nor can it be found in any standard dictionary.

IX

That the necessary effect of the said orders Exhibit A and Exhibit B is to grant a monopoly to the manufacturers of the so-called hallocks described in said orders and to prevent the sale of the type of strawberry or raspberry baskets

or cups manufactured by Plaintiff and others as hereinabove described, because dealers who formerly purchased such baskets from Plaintiff have been warned by officials of the State Department of Agriculture that they would not be allowed to sell strawberries or raspberries in any container other than the standard containers for strawberries and raspberries described in said orders in the State of Oregon during the season of 1934 or thereafter.

X

That section 3 of Chapter 225, Oregon Laws of 1933, provides that after a standard for a container has been adopted that it shall be unlawful to sell horticultural products, which includes strawberries and raspberries, which are packed in any container other than such standard containers, or to sell strawberries or raspberries in Oregon, no matter where packed, if in containers other than the standard, and the violation of such statute is made a misdemeanor punishable by fine and imprisonment.

XI

That the said orders made by Defendant Cole and approved by Defendant Gehlhar, dated respectively May 3, 1933, and June 1, 1933, and designated respectively "Standard Containers for Fruits and Vegetables" and "Oregon Standards for Strawberries (1933)", Exhibits A and B hereof, insofar as they relate to containers for strawberries or raspberries are unlawful and void for the following among other reasons:

1. Said orders are void because they deprive plaintiff of its property without due process of law, in violation of the provisions of the Constitution of the United States, particularly the provisions of Section 1 of the 14th Amendment of said Constitution, in that the type of baskets made by Plaintiff and herein above described cannot be used for packing strawberries or raspberries for sale in the State of [fol. 11] Oregon without making the users liable to arrest and subject to fine and imprisonment. Said orders arbitrarily interfere with the legitimate business of Plaintiff and have the effect of prohibiting it from selling its berry baskets to Oregon dealers, or to California dealers who desire to sell strawberries or raspberries in Oregon, all as more particularly set forth above.

2. Said orders are void because they deny to Plaintiff the equal protection of the laws in violation of the Constitution of the United States, particularly the provisions of Section 1 of the 14th Amendment of said Constitution. The orders grant a monopoly to manufacturers of so-called hallocks that are described in the said orders and that can only be made of spruce which is produced in the Northwest, and make illegal the sale of strawberries or raspberries in baskets or cups of a different type, manufactured by Plaintiff, even though such baskets adequately protect the contents, constitute honest measurement, and have no tendency to deceive the public, with the same cubic content as is provided in said orders. Said orders are unreasonably discriminatory in favor of the so-called hallock described in the orders and against the tin top baskets or cups made by Plaintiff, all as more particularly set forth above.

3. Said orders are void for the reason that they interfere with and impose unlawful burdens on the interstate commerce and business of Plaintiff, contrary to and in violation of the provisions of subdivision 3 of Section 8 of Article 1 of the Constitution of the United States. Plaintiff is prevented by said orders from obtaining orders from dealers in Oregon for baskets manufactured by it in California. A substantial part of Plaintiff's interstate business is cut off by the discriminatory character of said orders as they relate to strawberry and raspberry containers. That said orders were arbitrarily made by the Defendants, and have the effect of legislation which arbitrarily and unjustly discriminates against products made in another state.

XII

That the season for the sale of strawberries and raspberries is now at its height in Oregon and because of the threatened enforcement of said orders, Exhibit A and Exhibit B hereof, by Defendants and officials working under them, Plaintiff is losing valuable business each day, which but for said orders it would be receiving. That Plaintiff will continue to lose business and will lose and is losing its regular customers, unless and until the enforcement of said [fol. 12] orders Exhibit A and Exhibit B, insofar as they relate to strawberries and respberries, is restrained. That Plaintiff's property and business will suffer irreparable injury and damage through the loss of its customers and sales

unless the Defendants, and their agents, representatives and attorneys, are forthwith restrained and enjoined from the enforcement of said orders insofar as they relate to strawberry and raspberry containers.

XIII.

Plaintiff has no plain, speedy or adequate remedy at law against or on account of such injury and damage and Plaintiff is wholly without remedies except through the interposition of the equity jurisdiction of this Court.

Wherefore, Plaintiff herein prays:

(1) For a temporary restraining order herein enjoining and restraining Defendants, their successors in office, attorneys and agents, and all persons acting or purporting to act under their authority or the authority of either of them, until the hearing and determination of the application of Plaintiff for an interlocutory injunction as herein prayed for, from enforcing or taking any steps to enforce the said order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A hereof, and the order entitled "Oregon Standards for Strawberries (1933)", dated June 1, 1933, Exhibit B hereof, insofar as said order relates to containers for strawberries, and from notifying any dealer or producer in the State of Oregon that the use of the strawberry containers made by Plaintiff will be prevented or from in any way interfering with the use of said containers by dealers or producers in Oregon, and enjoining and restraining the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sections purport to sustain the above mentioned orders, Exhibit A and Exhibit B, and make the violation thereof unlawful and punishable.

(2) For an interlocutory injunction herewith restraining the Defendants, their successors in office, attorneys and agents, and all persons acting or purporting to act under their authority or the authority of either of them, until the final determination of this suit upon the merits, from enforcing or taking any steps to enforce the said order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A hereof, and the order en-

titled "Oregon Standards for Strawberries (1933)", dated [fol. 13] June 1, 1933, Exhibit B hereof, insofar as said orders relate to containers for strawberries or raspberries, and from notifying any dealer or producer in the State of Oregon that the use of the raspberry or strawberry containers made by Plaintiff will be prevented or from in any way interfering with the use of said containers by dealers or producers in Oregon, and enjoining and restraining the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sections purport to sustain the abovementioned orders, Exhibit A and Exhibit B, and make the violation thereof unlawful and punishable.

(3) For a final decree setting aside, vacating and adjudging null and void and of no force and effect the said order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A hereof, and the order entitled "Oregon Standards for Strawberries (1933)" dated June 1, 1933, Exhibit B hereof, insofar as said orders relate to containers for strawberries or raspberries, and perpetually enjoining and restraining said Defendants, their successors in office, attorneys and agents, and all persons acting or purporting to act under their authority or the authority of either of them, from enforcing or attempting to enforce the said orders.

(4) For judgment for Plaintiff's costs and disbursements herein.

(5) For such other and further relief as may be just and equitable.

Arthur A. Goldsmith, Hanna and Morton, Byron C. Hanna, Solicitors for Plaintiff.

EXHIBIT "A" TO AMENDED BILL OF COMPLAINT

STANDARD CONTAINERS FOR FRUITS AND VEGETABLES

As provided for in sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, a public hearing was held in Portland, Oregon, on the date of April 15, 1933, to consider standard containers for fruits and vegetables. Containers for the following fruits and vegetables were considered and recommended:

Apricots

Yakima Lug—4 inches deep, 11 inches wide, and 15⅛ inches long, all inside measurements.

L. A. Lug—5¾ inches deep, 13½ inches wide and 16⅛ inches long, all inside measurements.

Asparagus

Crate—10½ inches deep, 18½ inches long, top 8 inches wide, bottom 10½ inches wide, all inside measurements.

Cantaloups

Flat Crate—4½ inches deep, 13½ inches wide, and 22⅛ inches long, all inside measurements.

Pony Crate—11 inches deep, 11 inches wide, and 22⅛ inches long, all inside measurements.

Standard Crate—12 inches wide, 11½ inches deep, and 22⅛ inches long, all inside measurements.

Jumbo Crate—13 inches deep, 13 inches wide, and 22⅛ inches long, all inside measurements.

Cauliflower

Crate—8½ inches deep, 18 inches wide, and 22⅜ inches long, all inside measurements.

Cherries

L. A. Lug—5¾ inches deep, 13½ inches wide, and 16⅛ inches long, all inside measurements.

Box—4⅛ and 4¼ inches deep, 8⅝ inches wide, and 17¼ inches long, all inside measurements.

This container may be packed with or without a ⅜ inch center partition.

10 Pound Box—2¼ inches deep, 9 inches wide, and 18 inches long, all inside measurements.

Grapes

L. A. Lug—5¾ inches deep, 13½ inches wide, and 16⅛ inches long, all inside measurements.

U. S. Standard 4-quart climax basket. Bottom of basket 12x4½ inches, top 14x6¼ inches, height 4-11/16 inches, all outside measurements.

Peach

Box—3½, 4, 4½, 5, 5½ and 6 inches deep, 11½ inches wide, and 18 inches long, all inside measurements.

Peas

Box—9½ inches deep, 12 inches wide, 19⅝ inches long, all inside measurements.

Hamper—32-quart Federal standard hamper.

Bag—30-pound sack or bag.

Prunes

Basket—U. S. standard half bushel basket, (tub or round stave).

Display Lug—3⅜ inches deep, 10½ inches wide, and 15 inches long, inside measurements. A one-half inch cleat to be used on top of ends.

Raspberries

Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long, all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2x5¼x5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches.

Strawberries

Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks 2½x4⅜x4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches.

Tomato

Box—3½, 4, 4½, 5, 5½ and 6 inches deep, 11½ inches wide, and 18 inches long, all inside measurements.

L. A. Lug—5¾ inches deep, 13½ inches wide, 16⅛ inches long, all inside measurements.

Vegetable Crate

Crate—13 inches deep, 18 inches wide, and 21⅝ inches long, all inside measurements. This crate is standard for lettuce, beets, turnips, carrots, cabbage, spinach.

As provided by sections 18-2902 and 18-2903; Oregon Code 1930, and chapter 136, Oregon Laws, 1931, the above mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this the third day of May, 1933. I hereby designate the Department of Agriculture Bulletin as the publication in which said Order shall be published.

Charles A. Cole, Division Chief. Approved: Max Gehlhar, Director of Agriculture.

EXHIBIT "B" TO AMENDED BILL OF COMPLAINT

OREGON STANDARDS FOR STRAWBERRIES (1933)

Department of Agriculture, State of Oregon

Division of Plant Industry

Grades

U. S. No. 1 shall consist of strawberries of one variety, with the cap (calyx) attached, which are firm, not overripe, underripe, or undeveloped; and which are free from mold or decay and from damage caused by dirt, moisture, foreign matter, disease, insects, or mechanical or other means. UNLESS OTHERWISE SPECIFIED the minimum size shall be not less than three-quarters of an inch in diameter.

In order to allow for variations, other than size incident to proper grading and handling, not more than 10 per cent, by volume, of the strawberries in any lot may be below the requirements of this grade, but not to exceed one-half of this tolerance, or 5 per cent, shall be allowed for defects causing serious damage, and not more than one-fifth of this amount, or 1 per cent, shall be allowed for decay.

In addition, not more than 5 per cent, by volume, of the strawberries in any lot, may be below the specified minimum size.

U. S. No. 2 shall consist of strawberries which are free from decay and from serious damage caused by disease, insects, mechanical or other means. UNLESS OTHERWISE SPECIFIED the minimum size shall be not less than five-eighths of an inch in diameter.

In order to allow for variations other than size incident to proper grading and handling, not more than a total of 10 per cent, by volume, of the strawberries in any lot shall be allowed for defects causing serious damage but not to exceed three-tenths of this amount, or 3 per cent, shall be allowed for strawberries affected by decay.

In addition, not more than 5 per cent, by volume, of the strawberries in any lot may be below the specified minimum size.

Cull Grade: Strawberries not meeting the requirements of the foregoing grades shall be marked cull strawberries.

Definitions of Terms as Used in These Grades

Overripe means dead ripe, becoming soft, a condition unfit for shipment and necessitating immediate consumption.

Underripe means so immature that less than two-thirds of the surface of the berry is of a pink or red color.

Undeveloped means not having attained a normal shape and development owing to frost injury, lack of pollination, insect injury, or other causes. "Button" berries are the most common type of this condition.

Damage means any injury from the causes mentioned which materially affects the appearance, edible or shipping quality.

Serious damage means that the strawberries are soft, badly deformed, badly bruised, leaky, or otherwise seriously injured. Strawberries which are caked with dirt or which show no pink or red color shall be considered seriously damaged.

Diameter means the greatest dimension at right angles to a straight line running from the stem to the apex.

Package: The 24-pint hallock crate is the standard crate for strawberries. Size of crate, 6⅜ inches deep by 13¾ inches wide by 19¼ inches long, all inside measurements, with ½-inch center piece. Size of hallock shall be 2½ by 4⅜ by 4⅜ inches, outside measurements. Bottom of hallock set up ¾ inch, inside depth 1¾ inches.

Packing: The hallocks shall be well filled without undue air spaces. The net weight of the berries in each hallock shall be not less than 12 ounces.

Marking the Crate: The crates shall be marked on one end in a legible manner, in letters and figures of not less than ⅜-inch in height and not less than 3/16-inch in width, with the following information: Number of hallocks in crate, net weight of berries in hallock, grade and variety of berries and name and address, or brand, of the grower, shipper or packer, as the case may be. If the required markings do not show on the label they shall be stamped on the labeled end of the crate, or if no label is used, on one end of the crate as illustrated below:

TOP

24 12-ounce hallocks U. S. No. 1 Marshall Strawberries

LABEL

John Doe
Banks, Oregon

The foregoing grades and standards, as amended June 1, 1933, shall become effective July 15, 1933.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this, the 1st day of June, 1933.

Chas. A. Cole, Division Chief. Approved: Max Gehlhar, Director.

[fols. 14 & 15] *Duly sworn to by Herman Paine. Jurat omitted in printing.*

[File endorsement omitted.]

[fols. 16 & 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION TO FILE AMENDED BILL OF COMPLAINT—Filed June 15, 1934

It is hereby stipulated by and between the parties hereto acting through their respective solicitors, as follows:

1. Plaintiff may file an Amended Bill of Complaint, an unverified copy of which is attached hereto;

2. Defendants' Motion to Dismiss, filed on or about June 13, 1934, shall be considered a motion to dismiss the Amended Bill instead of the original Bill, and the motion to dismiss the Amended Bill will be argued before the Court of three judges on June 28, 1934;

3. The temporary restraining order heretofore issued shall remain in effect strictly in accordance with its terms, and shall not be deemed extended or its effect altered by this stipulation nor by the filing of the proposed Amended Bill;

4. Plaintiff's application for an interlocutory injunction as prayed for in the proposed Amended Bill will be argued before the said three judge Court on June 28, 1934;

It is further stipulated that service of a copy of the Amended Bill on the Attorney General shall be sufficient without the necessity of serving Defendants.

Dated June 15, 1934.

Arthur A. Goldsmith, Byron C. Hanna, Hanna & Morton, Solicitors for Plaintiff. I. H. Van Winkle, Willis S. Moore, Solicitors for Defendants.

[File endorsement omitted.]

[fols. 18 & 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed June 13, 1934

Come now the above named defendants, and move the court for an order dismissing plaintiff's bill of complaint herein, upon the grounds and for the reason:

1. That said bill of complaint does not state facts sufficient to entitle the complainant to the relief therein demanded, and that there is no equity in the bill.

I. H. Van Winkle, Attorney-General; Willis S. Moore, Assistant Attorney-General, Attorneys for Defendants.

STATE OF OREGON,
County of Marion, ss:

Due service of the within Motion to Dismiss by receiving a copy thereof duly certified as such by Willis S. Moore, one of the Attorneys for the Defendants, is hereby admitted in Multnomah County, Oregon, this 13th day of June, 1934.

Arthur A. Goldsmith, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HERMAN PAINE—Filed May 31, 1934

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Herman Paine, being first duly sworn, deposes and says: That he is the President of the Pacific States Box and Basket Company, the plaintiff herein, and makes this affidavit on its behalf in support of its renewed application for the issuance of a temporary restraining order in the above entitled suit; that neither the officers nor any representatives or agents of the plaintiff corporation were present at or had any knowledge or notice of proceedings for the establishment of standard strawberry containers for the State of Oregon; that the first notice to plaintiff, or to any of its officers or agents, of the promulgation or enactment of the orders or regulations complained of in the above entitled suit was on or about the 4th day of April, 1934, when plaintiff received, at its Western Basket and Barrel Plant, a copy of a printed pamphlet containing the said regulations; that said pamphlet did not disclose the intention of defendants to prohibit the sale of strawberries in the State of Oregon in containers or types other than the Hallock type described in said pamphlet as standard;

That on the 4th day of April, 1934, the plaintiff corporation, through its Western Basket and Barrel plant, addressed and forwarded a letter to the defendant Cole, a copy of

which is attached hereto, asking what other types of strawberry containers were standard in the State of Oregon; that on or about April 9, 1934 plaintiff received in reply the letter attached hereto, erroneously addressed to "Weston Basket and Barrel Co.", dated April 6, 1934 and signed by the defendant Cole as Chief of the Division of Plant Industry of the Department of Agriculture of the State of Ore-
[fol. 21] gon; that thereafter plaintiff sought to obtain a definite ruling from the said Department of Agriculture as to the interpretation by said department of the regulations complained of with respect to the marketing of strawberries in the State of Oregon in metal top strawberry baskets or cups of the type manufactured and sold by the plaintiff corporation, and to that end addressed and forwarded to said Department of Agriculture a letter dated April 9, 1934, directed to the attention of the defendant Cole, a copy of which is attached hereto, in which letter plaintiff corporation pointed out that the regulations complained of do not state that the Hallock basket is the only type of container which can be used for such purposes; that on April 11, 1934, plaintiff forwarded a telegram to defendant Cole asking for a reply to said letter of April 9, 1934, a copy of which telegram is attached hereto; that on or about April 15, 1934, plaintiff received the letter attached hereto, erroneously addressed to "Weston Basket and Barrel Co.", dated April 13, 1934, and signed by the defendant Cole; that on April 16, 1934 plaintiff forwarded a letter to the defendant Cole, dated April 16, 1934, a copy of which is attached hereto, and in reply to which plaintiff received the letter of April 20, 1934, attached to affiant's affidavit of May 24, 1934, heretofore filed;

That on April 16, 1934 affiant requested one Austin Chester, at Eugene, Oregon, to see defendant Cole on behalf of the plaintiff corporation and attempt to convince him of the injustice of the regulations complained of as theretofore interpreted by him; that on April 17, 1934 plaintiff corporation was advised by said Austin Chester that the defendant Cole would do nothing to permit the use of any container but the hallock type for the sale of strawberries in Oregon; that on April 18, 1934 affiant sent a telegram to said Austin Chester requesting a copy of the entire act under which the said regulations were adopted, and immediately upon receipt thereof, on April 20, 1934, delivered the

same to Byron C. Hanna, attorney at law, of Los Angeles, California; that the time intervening between April 20, 1934 and May 25, 1934 was taken up in the preparation of an opinion as to the validity of the regulations complained of and the preparation of the Bill of Complaint for filing with this Honorable Court.

Affiant here reaffirms each and every statement contained in his affidavit of May 24, 1934, filed in support of plaintiff's first application for a temporary restraining order; affiant further says that the first knowledge of or notice to plaintiff of any act of defendants toward the enforcement of the regulations complained of was on or about May 9, 1934, when [fol. 22] its Weston Basket and Barrel Plant received the two letters of May 7, 1934, from Ted's Feed and Seed Store of Ashland, Oregon, and F. E. Samson Co. of Medford, Oregon, respectively, attached as exhibits to affiant's said affidavit of May 24, 1934;

That the strawberry season in Oregon is now under way and will continue for at least one month; that orders for strawberry containers are being placed every day by dealers in the State of Oregon; that unless defendants are restrained, pending the hearing upon the Order to Show Cause heretofore issued, from enforcing the regulations complained of in the above entitled suit, plaintiff will suffer irreparable injury in the loss of the business of such dealers; that affiant prays that this Honorable Court issue a temporary restraining order upon the showing made by this affidavit.

Herman Paine.

Subscribed and sworn to before me this 29th day of May, 1934. Laura Teeter, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 23] EXHIBITS TO AFFIDAVIT OF HERMAN PAINE

"San Francisco, California,
April 4, 1934.

Mr. Chas. A. Cole, Division Chief,
Department of Agriculture,
State of Oregon, Salem, Oregon.

DEAR SIR:

We would be very pleased to have you send us by return of mail a copy of the law relating to the Standard Pint

Baskets and Crates that are allowed to be used in your State.

We have a copy of pamphlet entitled Oregon Standards for Strawberries (1933) Dept. of Agri. State of Oregon, Division of Plant Industry Grades, which specified that the Hallock Basket and Crate is a standard container, but what we would like is the information as to the other type of Pint Berry Baskets and Crates that are also standard in your State.

Your prompt reply will grealy oblige,

Yours very truly, Weston Basket & Barrel Plant.

HLH."

[fol. 24] "Max Gehlhar, Director.

Division of Plant Industry,
Chas. A. Cole, Division Chief.

Phone 4114

Department of Agriculture,

Agricultural Bldg.

Salem, Oregon, April 6, 1934.

Weston Basket & Barrel Co.,
813 Folsom Street,
San Francisco, California.

GENTLEMEN:

In reply to your letter of April 4th in regard to berry containers, we are herewith sending you standards for raspberries and blackberries.

Our regulations allow only one type of container for these small fruits.

Respectfully yours, (Signed) Chas. A. Cole, Division Chief.

CAC:H.
Enc."

[fol. 25] "April 9, 1934.

Department of Agriculture,
Salem, Oregon.

Attention: Mr. Charles A. Cole

GENTLEMEN:

We acknowledge receipt of your favor of the 6th enclosing pamphlets covering Oregon standards for berries and

note under the head of "Package" that the 24 pint hallock crate is the standard crate for strawberries and raspberries.

In your favor of the 6th you state that "our regulations allow only one type of container for these small fruits."

We understand that the hallock is a standard pint container. There are also 34 other styles or shapes of berry baskets that are standard pint containers approved by the United States Government Department of Agriculture for berries. We also understand that berries can be marketed regardless of the shape or size of the basket so long as it complies to the regulations covering cubical contents.

As we are a manufacturer of several styles of pint berry baskets we are very much interested in a definite ruling from your Department as to whether they can be used in the State of Oregon by Oregon growers. We do not see anything in your pamphlet which states that the 24 pint hallock must be used for strawberries—it simply states it is a standard crate for berries, while your letter says that you only allow one type of container for small fruits.

It is our opinion that any legislation designating one style of package forcing discrimination against other kinds of packages which conform with the Laws as to cubical contents is unconstitutional and cannot under any circumstances be enforced and we desire a definite ruling from your Department as to whether it is illegal to put stawberries in metal top standard one pint baskets and market in the State of Oregon.

Yours very truly, Weston Basket & Barrel Plant.
H. Hofstetter.

HH:HH."

[fol. 26] Postal Telegraph Blank

"Night Letter x #813 Folsom Street,
San Francisco, April 11, 1934.

Mr. Charles A. Cole,
Department of Agriculture,
Salem, Oregon.

Wire immediately advising whether you have mailed ruling as requested in our letter of April Ninth advising if metal top standard pint berry baskets for use in the State of Oregon are illegal.

Weston Basket & Barrel Plant.

Charge."

[fol. 27] "Max Gehlhar, Director.

Division of Plant Industry,
Chas. A. Cole, Division Chief.

Phone 4114

State of Oregon

Department of Agriculture

Department of Agriculture

Agricultural Building

Salem, Oregon

April 13, 1934.

Weston Basket & Barrel Co.,
813 Folsom Street,
San Francisco, California.

GENTLEMEN:

Your wire in regard to our standard berry crate and hallock was on my desk when I return- from a trip out of town; also your letter of April 9th acknowledging receipt of pamphlets covering grades.

If you will notice under heading "Package" our standard container is a 24 pint crate and the dimensions of this crate are given and also the dimensions of the hallock. You will also find a similar description in regard to raspberries under the heading "Package".

According to our law, it is illegal to market strawberries in Oregon in packages that do not conform to our regulations. The tin-top strawberry hallock is not standard in Oregon.

Respectfully yours, Chas. A. Cole, Division Chief.

CAC:H."

[fols. 28 & 29] "April 16, 1934.

Mr. Chas. A. Cole,
Department of Agriculture,
Salem, Oregon.

DEAR SIR:

We are in receipt of your letter of the 13th in reply to our wire of the 11th and letter of April 9th, and note you

state the TinTop strawberry baskets are not standard in Oregon.

We have your pamphlet which gives the specifications covering the standard hallock crate and basket. This does not give us a copy of the ruling which states the tintop strawberry baskets are illegal to be used in Oregon and would be pleased to have you send a copy of your Law covering same by return mail.

Yours very truly, Weston Basket & Barrel Plant.

HLH."

[File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING ON PLAINTIFFS, APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed June 15, 1934

To Honorable Julius L. Meier, Governor of the State of Oregon, and Honorable I. H. Van Winkle, Attorney General of the State of Oregon, and Defendants Max Gehlhar as Director of Agriculture for the State of Oregon, and Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon:

You and each of you will please take notice that on Thursday, June 28, 1934, at 10 o'clock A. M. or as soon thereafter as counsel may be heard, at the United States District Court at Portland, Oregon, Plaintiff will apply to the statutory Court of three judges as provided in Section 266 of the United States Judicial Code as amended, for an interlocutory injunction restraining the above named Defendants, their successors in office, attorneys and agents and all persons acting or purporting to act under their authority or the authority of either of them until the final determination of this suit upon the merits, from enforcing or taking any steps to enforce that certain order entitled "Standard Containers for Fruits and Vegetables" dated May 3, 1933, Exhibit A of the amended Bill of Complaint, and the order en-

titled "Oregon Standards for Strawberries (1933)" dated June 1, 1933, Exhibit B of the Amended Bill of Complaint, insofar as said orders relate to containers for strawberries and raspberries, or respberries, and from notifying any dealer or producer in the State of Oregon that the use of the strawberry or raspberry containers made by Plaintiff will be prevented or from in any way interfering with the use of said containers by dealers or producers in Oregon, and enjoining and restraining the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, as these sec- [fols. 31 & 32] tions purport to sustain the above mentioned orders, Exhibits A and B, and make the violation thereof unlawful and punishable.

In support of this application, Plaintiff refers to and will rely upon the verified Amended Bill of Complaint on file herein and on each and all of the allegations therein contained, and upon the affidavits of Herman Paine and such other affidavits as Plaintiff may serve on Defendants.

Arthur A. Goldsmith, Byron G. Hanna, Hanna and Morton, Solicitors for Plaintiff.

Dated June 15th, 1934.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Marion County, Oregon, on the 15th day of June, 1934.

J. L. Meier, B. W.

For Defendants, I. H. Van Winkle, Max Gehlar, Chas. A. Cole.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF HERMAN PAINE—Filed June 26, 1934

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Herman Paine, being first duly sworn, deposes and says: That he is is the President of the Pacific States Box and

Basket Company, the plaintiff herein, and makes this affidavit on its behalf. Affiant here reaffirms each and every statement contained in the affidavits of May 24, 1934, and May 29, 1934, heretofore filed in the above entitled cause. That the tin top baskets and cups manufactured by the plaintiff corporation and sold by it to dealers in the State of Oregon and in Northern California for ultimate use in the State of Oregon, referred to in said affidavit of May 24, 1934, as "strawberry baskets or cups", are used by such dealers and others as containers not only for strawberries but also for raspberries, as appears from the attached letter of R. McElligott, proprietor of Mac's Seed and Feed Store of Grant's Pass, Oregon, dated April 2, 1934, and the attached telegram of Monarch Seed & Feed Co. of Medford, Oregon, dated June 13, 1934, and addressed to Angelo & Sons. That said letter of April 2, 1934, was received by the Weston Basket and Barrel plant of the plaintiff corporation on or about the 4th day of April, 1934; that Angelo & Sons is a corporation engaged in the manufacture and sale of tin top baskets and cups identical with those manufactured and sold by the plaintiff corporation, the entire capital stock of said [fol. 34] Angelo & Sons being wholly owned by the plaintiff corporation. That neither the officers nor any representatives or agents of the plaintiff corporation were present at or had any knowledge or notice of proceedings for the establishment of standard raspberry containers for the State of Oregon. That the first notice to plaintiff, or to any of its officers or agents, of the adoption of the order or regulation relating to raspberry containers complained of in the above entitled suit was on or about the 9th day of April, 1934 when plaintiff received the letter dated April 6, 1934, signed by the defendant Cole, annexed to the said affidavit of May 29, 1934; that thereafter the plaintiff and affiant took the steps and received and sent the communications set forth in affiant's said affidavit of May 29, 1934, at page 2, line 13, to page —, line 18, thereof. That the first knowledge of or notice to the plaintiff corporation of any intent on the part of the defendants to prohibit the sale of raspberries in the State of Oregon in such tin top baskets or cups was on the 13th day of June, 1934, when affiant was advised by plaintiff's counsel that on or about June 12, 1934, counsel for defendants had refused to advise his clients to refrain from enforcing the said regulation as to raspberry containers on

the temporary restraining order thereto- the above entitled court related only to the regulation establishing a standard container for strawberries; that affiant immediately instructed plaintiff's counsel to take steps toward enjoining the enforcement of said regulation relating to containers for raspebrries in the State of Oregon as far as it prohibited the use for such purposes of the tin top baskets or cups manufactured and sold by the plaintiff.

That the value to plaintiff of its established business in the sale of tin top baskets or cups to dealers in the State of Oregon for use as strawberry and raspberry containers is at least $50,000.00. That plaintiff's net receipts from sales during the years 1932 and 1933 of tin top baskets or cups to dealers in Oregon for use as strawberry and raspberry containers in the State of Oregon amounted to $6,699.62 after deducting allowances for freight to such dealers. That many such tin top baskets or cups were sold by the plaintiff corporation during the said years of 1932 and 1933 to dealers in the northern part of the State of California for ultimate use as containers of strawberries and raspberries in the State of Oregon, but the amount of net receipts from such sales is unknown to affiant and cannot [fol. 35] readily be ascertained.

That Hallock baskets of the types required by the regulations complained of in the above entitled suit as standard containers for strawberries and raspberries are made of rotary cut veneer, taken directly from spruce logs; that such spruce logs are not available at or near the plants of the plaintiff corporation and cannot be transported thereto except at prohibitive cost; that the cost of such transportation would be so high as to make the cost of manufacturing such Hallock baskets at the plants of the plaintiff corporation greater than the selling price in the State of Oregon of such Hallock baskets made by plaintiff's competitors who are now engaged in the manufacture thereof; that even if such spruce logs were readily and conveniently available at the plants of the plaintiff corporation, plaintiff would have to install a large amount of new machinery to enable it to manufacture such Hallock baskets in quantities equivalent to its average sales of tin top baskets or cups in the State of Oregon during the past two years; that such necessary machinery would cost at least $25,000.00 to install.

That the corporation has established a reputation in the State of Oregon as a manufacturer and seller of tin top baskets and cups; that the strawberry and raspberry season in the State of Oregon is now at its height; that orders for tin top baskets and cups for use as strawberry and raspberry containers are being placed every day by dealers in the State of Oregon; that unless defendants are restrained and enjoined pending the trial of the above entitled cause from enforcing the regulations therein complained of, plaintiff will suffer irreparable injury in the loss of the business of such dealers.

Herman Paine.

Subscribed and sworn to before me, this 15th day of June, 1934. Carrie R. Hammond, Notary Public in and for the County of Los Angeles, State of California.

[fol. 36] EXHIBITS TO AFFIDAVIT OF HERMAN PAINE

Mack's Seed and Feed Store

R. McElligott

Gill Bros. Seeds Sperry's Poultry and Dairy Feeds

514 So. 6th Street

Grants Pass, Oregon,
Apr. 2nd, 1934.

Sold to

Weston Basket & Barrel Co.,
San Francisco.

GENTLEMEN:

Replying to yours of March 24th.

The Berry crop and also the prospects for a fair price looks very favorable this year. However, there is a change in the law as you will see by enclosed pamphlet regarding the use of the Hallocks.

Do you make them if not where can I get them. We will of course use your Florin cups for Raspberries but the bulk of the crop is Strawberrys and it is going to make it hard

for a dealer to handle both varietys and harder still if we have to get our supplies from different services.

Yours truly, R. McElligott

[fols. 37 & 38] Western Union Blank

Faf40 53 Dl Collect Medford Org. 13 944A

1934 Jun 13 AM 10 03

Angelo & Sons-
398 Bay St-

This is to inform you that Florin Tin Top Berry Cups are being and have been used in this territory for years for Raspberries, Strawberries, Loganberries, Dewberries, Youngberries, Currants, and all bush or vine berries and have served the purpose equally as well as any substitute container ever to enter this field.

Monarch Seed & Feed Co.

[File endorsement omitted.]

[fol. 39] In United States District Court for the District of Oregon

E-9443

Pacific States Box and Basket Company, a California corporation, Plaintiff,

v.

Max Gehlhar, as Director of Agriculture for the State of Oregon, and Chas. A. Cole, as Chief of the Division of Plant Industry for the Department of Agriculture for the State of Oregon, Defendant

Arthur A. Goldsmith, Hanna & Morton, Byron C. Hanna for Plaintiff;

I. H. Van Winkle, Attorney General, Willis S. Moore, Assistant Attorney General.

Before Garrecht, Circuit Judge, and McNary and Fee, District Judges

Opinion—Filed Dec. 17, 1934

McNary, District Judge:

This is a suit to enjoin the defendants from enforcing orders of the Department of Agriculture of Oregon fixing

standard containers for strawberries and raspberries, made in pursuance of sections 18-2902 and 18-2911 of the Oregon Laws. The orders provide that the standard containers for such fruits shall be:

"Raspberries

Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long, all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2 x 5¼ x 5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches.

"Strawberries

Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks 2½ x 4⅜ x 4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches."

Plaintiff alleges that for many years past it has been [fol. 40] engaged in the business of manufacturing in the State of California containers for strawberries and raspberries, made of two thin strips of wood crossing each other to form the bottom and bent upwards to form the sides, reinforced with a narrow metal strip to protect the baskets and the contents, and to insure uniformity of cubic measure. When constructed, the containers have an opening to insure ventilation, and a cubic content of one pint. That for the past nine years the plaintiff has sold its containers to dealers in the State of Oregon in large quantities, and they are in common use throughout the United States. That the type of containers mentioned in the orders must be made from spruce grown only in the Northwest, and cannot be manufactured by plaintiff without expensive change in its machinery. That the orders when enforced will prevent plaintiff from selling its containers in Oregon, although they have the same cubic content and provide the same or better protection for fruit than the standard containers. That there is no necessity for the orders based upon consideration of public health, or to prevent fraud or deception or other than legitimate use of the police power. That said orders were made and promulgated arbitrarily, capriciously

and without justification, and are void because they deprive plaintiff of its property without due process of law and without equal protection of the law, and that the orders are void because they interfere with and impose unlawful burdens on interstate commerce and the business of plaintiff, in violation of the constitution of the United States.

The matter is before the court on plaintiff's motion for an interlocutory injunction and defendants' motion to dismiss the bill of complaint on the ground that it does not state facts sufficient to entitle plaintiff to the relief demanded.

In Oregon large quantities of strawberries and raspberries are raised and sold in local and distant markets. Success of this industry is not only vital to a large number of growers, but has an important bearing on the economic life of the state.

It is a matter of general knowledge that enforced standardization of containers is essential to the economic handling, shipping and selling of horticultural products, for, [fol. 41] among other reasons, it prevents fraud and deception in sales, provides the best method of stowage, and eliminates many sizes that complicate the problems of transportation.

Legislation designed to aid and promote the industry in the manner provided by the Oregon laws falls within the legitimate use of the police power of the state.

The issue tendered as to the necessity of such legislation, based upon considerations of public health or to prevent fraud or deception, was effectively answered by the legislature in passing laws authorizing and empowering the Department of Agriculture to fix and promulgate standard containers, and making noncompliance therewith a misdemeanor, and its determination will not be interfered with by this court unless it plainly appears that the constitutional rights of plaintiff have been violated.

Schmidinger v. Chicago, 226 U. S. 578, involved the validity of an ordinance of the City of Chicago fixing weight standards for loaves of bread. The court said:

"This court has frequently affirmed that the local authorities entrusted with the regulation of such matters and not the courts are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursu-

ance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred. Jacobson v. Massachusetts, 197 U. S. 11; Mugler v. Kansas, 123 U. S. 623; Minnesota vs. Barber, 136 U. S. 313, 320; Atkin v. Kansas, 191 U. S. 207, 223; McLean v. Arkansas, 211 U. S. 539."

Powell v. Pennsylvania, 127 U. S. 678, was a suit to test the validity of a statute of Pennsylvania relating to the manufacture and sale of oleomargarine butter. The court said (p. 686):

"The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."

Price v. Illinois, 238 U. S. 447;
[fol. 42] Hebe Co. v. Shaw, 248 U. S. 297;
Radice v. New York, 264 U. S. 292;
Insurance Co. v. Glidden Co., 284 U. S. 151.

The containers are so unlike in design, strength and material used that it requires skill and experience in the handling and shipping of fruit to compare intelligently their respective advantages. It is presumed that the authorized legislative agency fully and fairly considered all the facts relating to the merits of the containers manufactured by plaintiff, as well as those adopted as the standards, and its determination as culminate in the orders was a finding that

the standards so fixed were better adapted to carry out the beneficial objects of the legislation.

Whether the Department of Agriculture acted wisely in making its selections, or whether the containers manufactured by the plaintiff are as well or better adapted to the intended use, does not present a subject for judicial review. The power of this court to adjudicate matters of that nature is limited to cases where it appears from the facts alleged that the orders are so clearly arbitrary and discriminatory as to invade the rights secured to plaintiff by the organic law. Facts essential to raise such an issue do not appear in the record.

It is contended that the orders are void because they interfere with and impose unlawful burdens on interstate commerce and the business of plaintiff.

There is nothing in the law which would indicate that the Oregon Legislature intended to encroach upon the exclusive powers of Congress to regulate interstate commerce, but on the contrary the law expressly excludes from its operation products brought from outside the state and offered for sale or consignment in the original packages. However, the plaintiff will not be denied the right to ship its containers through the channels of interstate commerce, for the orders will not affect the containers until they have lost their character as such commerce and have been sold to dealers and used in the selling and shipping of fruit.

The commerce clause of the United States Constitution protects only that which is the subject of interstate commerce and transported over lines of interstate communication. When the property arrives in the state of its destina- [fols. 43 & 44] tion, and passes from the importer to the buyer to be used in intrastate trade, it ceases to be an article of interstate commerce and becomes a part of the general property of the state and amendable to its laws.

The question when the paramount power of congress terminates and that of the state begins came directly before the Supreme Court of the United States for the first time in the case of Brown v. Maryland, 12 Wheat. 419, and the court, through Mr. Chief Justice Marshall, held that an article authorized by a law of congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale, in the original bale, package, or vessel in which it was im-

ported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign ocmmerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property.

This ruling has been followed in many later cases.

The motion for an interlocutory injunction will be denied, and the motion to dismiss will be allowed.

[File endorsement omitted.]

[fols. 45 & 46] In United States District Court

[Title omitted]

Order Denying Interlocutory Injunction—Filed Dec. 21, 1934

This matter having come on regularly for hearing by a statutory court of three judges, consisting of Honorable Francis A. Garrecht, Honorable John H. McNary, and Honorable James Alger Fee, upon plaintiff's application for an interlocutory injunction, and upon defendants' motion to dismiss plaintiff's amended bill of complaint herein upon the ground that said amended bill of complaint does not state facts sufficient to entitle the plaintiff to the relief therein demanded, and that there is no equity in the bill; the court having heard the argument of counsel for and on behalf of plaintiff and of counsel for and on behalf of the defendants, and having examined briefs submitted for the respective parties, and being now fully advised in the premises.

It is hereby ordered that plaintiff's application for an interlocutory injunction be and the same hereby is denied.

It is hereby further ordered that plaintiff's bill of complaint herein be and the same hereby is dismissed.

John H. McNary, Judge.

[File endorsement omitted.]

[fols. 47 & 48] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

No. E-9443

PACIFIC STATES BOX AND BASKET COMPANY, a California corporation, Plaintiff,

vs.

MAX GEHLHAR, as Director of Agriculture for the State of Oregon, and CHAS. A. COLE, as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, Defendants

FINAL DECREE—Filed Feb. 27, 1935

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof,

It is hereby ordered, adjudged and decreed that Plaintiff's prayer for a permanent injunction be and the same is hereby denied and Plaintiff's suit be and the same is hereby dismissed.

John H. McNary, Judge.

Dated Feb. 27, 1935.

Due and legal service of the foregoing, by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Marion County Oregon on this 19th day of January, 1935.

Willis S. Moore, of Attorneys for Defendants.

[File endorsement omitted.]

[fol. 49] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed March 18, 1935

To the Honorable Judges of the District Court of the United States for the District of Oregon:

Your petitioner, Pacific States Box and Basket Company, a corporation, respectfully shows: That heretofore your petitioner filed its bill of complaint and thereafter on stipulation with Defendants and the approval of this Court, filed its amended bill of complaint, said amended bill of complaint asking that Defendants be enjoined from enforcing certain orders issued and promulgated by them as officials of the State of Oregon and to enjoin the enforcement of certain statutes of the State of Oregon, on the ground that said orders were unconstitutional. In said original bill of complaint, Plaintiff prayed for a temporary restraining order which was granted and in said bill of complaint and in the amended bill of complaint, an interlocutory injunction was asked for. Thereafter the hearing on the interlocutory injunction and upon Defendants' motion to dismiss Plaintiff's bill on the ground that said bill did not state facts sufficient to entitle Plaintiff to the relief demanded and that there was no equity in the bill, came on for hearing before a statutory court of three judges consisting of Honorable John H. McNary and James A. Fee, District Judges, and Honorable Francis A. Garrecht, a judge of the Circuit Court of Appeals. After the presentation of all arguments and the filing of briefs by the parties, an opinion was rendered by said three-judge court denying plaintiff's application for an interlocutory injunction and granting Defendants' motion for a dismissal of Plaintiff's bill. Thereafter and on or about December 21, [fols. 50 & 51] 1934, the statutory court of three judges entered its order that Plaintiff's application for an interlocutory injunction be denied and further ordered that Plaintiff's bill of complaint be dismissed. Thereafter, and on February 27, 1935, the said court entered a final decree denying Plaintiff's prayer for a permanent injunction and dismissing the above entitled suit.

The said order denying Plaintiff's application for an injunction and granting Defendants' motion to dismiss Plaintiff's amended bill, and the said final decree denying Plaintiff's prayer for a permanent injunction and dismissing the above entitled suit are greatly to the prejudice and injury of Plaintiff and are erroneous and inequitable.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the Assignments of Error, filed with the Clerk pursuant to Rule 9 of the Rules of the United States Supreme Court; and there has been likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rule 12 of the Rules of the United States Supreme Court.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity to show the errors complained of, your petitioner prays for the allowance of an appeal in said cause to the Supreme Court of the United States agreeably to the statutes and rules of said court in such cases made and provided, and that a proper order touching the security required of the petitioner be made.

Arthur A. Goldsmith, Byron C. Hanner, Solicitors for Petitioner.

Dated March 18, 1935.

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 18, 1935

Comes now Pacific States Box and Basket Company, plaintiff and appellant in the above entitled cause, and files the following Assignment of Errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the interlocutory order of this Court entered on December 21, 1934, and from the final decree denying plaintiff's prayer for a permanent injunction and dismissing the above entitled suit, which final decree is dated February 27, 1935.

I

The Court erred in refusing to enjoin the defendants and their successors in office in their official capacities as heads of the Department of Agriculture for the State of Oregon, from enforcing orders of said Department fixing standard containers for strawberries and raspberries, which orders provided that the standard containers for such berries shall be: "Raspberries: Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long, all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2x5¼x5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches." "Strawberries: Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks, 2½x4⅜x4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches." The first of these orders was dated May 3, 1933, and entitled "Standard Containers for Fruits and Vegetables" and the other order was dated June 1, 1933, and entitled "Oregon Standards for Strawberries (1933)", the material parts of said orders [fol. 53] so far as they relate to raspberries and strawberries being the same. Said orders are attached to and made a part of Plaintiff's amended bill of complaint as Exhibit-A and B thereof.

II

The Court erred in failing to enjoin the enforcement of Section 18-2902 and Section 18-2911, Oregon Code of 1930 (the official publication and compilation of the general laws of Oregon) and Section 3 and Section 8 of Chapter 225, Oregon Laws of 1933 (which was officially published by the State of Oregon under such title) insofar as they purport to sustain the orders mentioned in Assignment of Errors No. I and make the violation thereof unlawful and punishable. These statutory provisions are set forth in full in Paragraph IV of plaintiff's amended bill of complaint.

III

The Court erred in failing to hold that the orders in question are arbitrary, capricious and unlawful as they relate to strawberry and raspberry containers.

IV

The Court erred in refusing to hold that the said orders above referred to and the statutory provisions under which they were issued, insofar as they relate to strawberry and raspberry containers, were void as being in conflict with Section 1 of the 14th Amendment of the Constitution of the United States, and in failing to hold that said orders deprive Plaintiff of its property without due process of law.

V

The Court erred in failing to hold that said orders and statutory provisions above referred to, insofar as they relate to strawberry and raspberry containers, were void and were in conflict with Section 1 of the 14th Amendment of the Constitution of the United States in that they deprive Plaintiff of the equal protection of the law.

VI

The Court erred in refusing to hold that said orders and the statutory provisions above referred to were void and were in conflict with sub-section 3 of Section 8 of Article 1 of the Constitution of the United States in that they interfere with and impose unlawful burdens on the interstate commerce and business of the Plaintiff.

[fol. 54]

VII

The Court erred in refusing to hold that the orders above mentioned and the statutory provisions above set forth, insofar as they purport to sustain such orders, relating to raspberry and strawberry containers, are violative of the constitutional rights of plaintiff.

VIII

The Court erred in failing to find the facts specially and to state separately its conclusions of law thereon, as provided in Federal Equity Rule No. 70½.

IX

The Court erred in denying plaintiff's application for an interlocutory injunction enjoining the enforcement of the orders and statutory provisions cited in Assignment of

Errors No. I and II hereof, in that the amended bill of complaint and the supporting affidavits were not denied, and said amended bill of complaint and affidavits set forth facts showing the said orders and statutory provisions, in question, to be unconstitutional.

X

The Court erred in granting defendants' motion to dismiss plaintiff's amended bill of complaint in that said amended bill of complaint did state sufficient facts to warrant the issuance of an injunction against the orders and statutes, which were clearly shown to be unconstitutional.

XI

The Court erred in entering a final decree dismissing plaintiff's suit and denying its application for a permanent injunction in that such action was taken without the introduction of any testimony, and where the record consisted of plaintiff's amended bill of complaint and uncontradicted affidavits in support of its application for an injunction, which amended bill of complaint alleged sufficient facts to warrant the conclusion that the orders were clearly arbitrary, unreasonable and capricious, and therefore unconstitutional and void.

Prayer for Reversal

For errors and reasons aforesaid, said plaintiff and appellant, Pacific States Box and Basket Company, prays that the said interlocutory order and final decree of the statutory three-judge District Court of the United States for [fols. 55-64] the District of Oregon in said cause be reversed and the case remanded with instructions to grant the injunction prayed for, with costs.

Respectfully submitted, Arthur A. Goldsmith, Byron C. Hanna, Solicitors for Appellant.

[File endorsement omitted.]

[fols. 65 & 66] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 18, 1935.

The petition of Pacific States Box and Basket Company, the complainant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the District Court of the United States for the District of Oregon, having been filed herein, accompanied by assignment of errors and statement as to jurisdiction, all as provided by Rules 9 and 12 of the Rules of the United States Supreme Court, and the said papers having been presented to this Court and the record in this cause having been considered:

It is hereby ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the interlocutory decree of the District Court of the United States for the District of Oregon entered in this cause on the 21st day of December, 1934, and from the final decree of said District Court of the United States for the District of Oregon, which final decree was entered in this cause on the 27th day of February, 1935, and that the Clerk of the said District Court of the United States for the District of Oregon shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his oath and the seal of the Court, a true copy of the material parts of the record herein, which shall be designated by praecipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a good and sufficient cost bond in the sum of $500.00 conditioned as required by law.

Done by Court this 18th day of March, 1935.

(Sgd.) John H. McNary, District Judge.

[File endorsement omitted.]

[fols. 67-71] Bond on Appeal for $500.00, approved and filed March 20, 1935, omitted in printing.

[fol. 72] IN UNITED STATES DISTRICT COURT

[Title omitted.]

PRAECIPE FOR TRANSCRIPT OF RECORD.—Filed March 23, 1935

To Mr. G. H. Marsh, Clerk of the above entitled Court:

In preparing the record on appeal in the above entitled cause, you are directed to incorporate therein the following papers:

1. Plaintiff's amended bill of complaint and exhibits.
2. Stipulation dated June 15, 1934, allowing filing of amended bill of complaint, but omitting copy thereof.
3. Affidavit of Herman Paine dated May 29, 1934, with exhibits thereto.
4. Affidavit of Herman Paine dated June 15, 1934, with exhibits thereto.
5. Notice of hearing on plaintiff's application for interlocutory injunction.
6. Defendants' motion to dismiss.
7. Opinion of statutory three-judge Court.
8. Order of December 21, 1934, denying plaintiff's application for interlocutory injunction and granting defendants' motion to dismiss.
9. Final decree dated February 27, 1935.
10. Petition for appeal.
11. Order allowing appeal.
12. Citation on appeal, and record of proof of service thereof.
13. Bond on appeal and approval thereof.
14. Assignment of errors and prayer for reversal.
15. Statement of jurisdiction.

[fol. 73] 16. Proof of service and notice directing attention to provisions of Rule 12, paragraph 3.

Arthur A. Goldsmith, Byron C. Hanna, Solicitors for appellant.

Service of a copy of the above præcipe acknowledged this 21st day of March, 1935.

Willis S. Moore, of Solicitor for appellees.

[File endorsement omitted.]

[fol. 74] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 75] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed May 9, 1935.

Comes now the Appellant and adopts its Assignment of Errors as its statement of the points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated May 2, 1935.

Arthur A. Goldsmith, Byron C. Hanna, Counsel for Appellant.

Service acknowledged, this 3rd day of May, 1935.

Willis S. Moore, of Counsel for Appellees. Address: Salem, Oregon.

[fols. 76 & 77] [File endorsement omitted.]

Endorsed on cover: File No. 39,583. Oregon, D. C. U. S. Term No. 48. Pacific States Box and Basket Company, Appellant, vs. Max Gehlhar, as Director of Agriculture for the State of Oregon, et al. Filed May 9, 1935. File No. 48 O. T. 1935.

(6554-C)

FILE COPY

FILED
MAY 9 1935
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. ~~385~~ 48

PACIFIC STATES BOX & BASKET COMPANY,

Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

STATEMENT AS TO JURISDICTION.

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 955

PACIFIC STATES BOX & BASKET COMPANY,
A CALIFORNIA CORPORATION,

Plaintiff and Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, AND CHAS. A. COLE, AS CHIEF OF THE DIVISION OF PLANT INDUSTRY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF OREGON,

Defendants and Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THIS HONORABLE COURT:

Pacific States Box and Basket Company, the above-named appellant, herewith makes its statement in accordance with Rule 12 of the Rules of this Court, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the interlocutory order and final decree heretofore made by the statutory court of three judges con-

sisting of Honorable Francis A. Garrecht of the Circuit Court of Appeals, Honorable John H. McNary, and Honorable James Alger Fee of the United States District Court for the District of Oregon, which interlocutory order denied appellant's application for an interlocutory injunction and granted appellees' motion to dismiss appellant's amended bill of complaint; and the final decree of said court which denied Plaintiff's prayer for a permanent injunction and dismissed plaintiff's suit.

(A) Statutory Provisions.

The statutory provisions upon which appellant relies to sustain jurisdiction of the Supreme Court is Judicial Code Sec. 266 as amended (Title 28 U. S. C. A. Sec. 380) which so far as pertinent herein provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. • • • The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

(B) Statutes and Orders, Validity of Which Is Involved.

Appellant challenges the validity of certain orders fixing standard containers for berries made and promulgated by Defendant Chas. A. Cole in his official capacity as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Orgeon and as approved by Max Gehlhar as Director of Agriculture for the State of Oregon, one of which orders is dated May 3, 1933, and is entitled "Standard Containers for Fruits and Vegetables" and the other order is dated June 1, 1933, and is entitled

"Oregon Standards for Strawberries (1933)" in so far as said orders or regulations relate to containers for strawberries and raspberries, which orders or regulations were made under the purported authority of Section 18-2902 and Section 18-2911 of Oregon Code of 1930, and Sections 3 and 8 of Chapter 225 of Oregon Laws of 1933, and appellant also challenges the validity of said statutes in so far as such statutes purport to sustain the above mentioned orders and make the violations thereof unlawful and punishable. There is quoted herewith that part of the above mentioned orders, the validity of which is involved:

"Standard Containers for Fruits and Vegetables.

Raspberries.

Crate—24-pint hallocks, 5⅛ inches deep, 16⅝ inches wide, and 23¼ inches long all inside measurements. Center partition ¾ inches, ends and partition grooved for double deck. Size of hallock, 2 x 5¼ x 5¼ inches, outside measurements: Bottom set up ¾ inch, inside depth 1¼ inches.

Strawberries.

Crate—24-pint hallocks, 6⅜ inches deep, 13¾ inches wide, and 19¼ inches long, all inside measurements. Half inch center piece. Size of hallocks, 2½ x 4⅜ x 4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches.

As provided by sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, the above mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of

time until January 1, 1934, in order to make use of such material.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this the third day of May, 1933. I hereby designate the Department of Agriculture Bulletin as the publication in which said Order shall be published.

CHAS. A. COLE,
Division Chief.

Approved:
MAX GEHLHAR,
Director of Agriculture."

"Oregon Standards for Strawberries

(1933)

Department of Agriculture, State of Oregon.

Division of Plant Industry.

Definition of Terms:

Package: The 24-pint hallock crate is the standard crate for strawberries. Size of crate, 6⅜ inches deep by 13¾ inches wide by 19¼ inches long, all inside measurements, with ½-inch center piece. Size of hallock shall be 2½ by 4⅜ by 4⅜ inches, outside measurements. Bottom of hallock set up ¾ inch, inside depth 1¾ inches.

The foregoing grades and standards, as amended June 1, 1933, shall become effective July 15, 1933.

Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this, the 1st day of June, 1933.

CHAS. A. COLE,
Division Chief.

Approved:
MAX GEHLHAR,
Director."

The following are the pertinent provisions of the statutes referred to above: Section 18-2902, Oregon Code of 1930, provides as follows:

> "In order to promote, protect, further and develop the horticultural interests of this state, the board is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to change any of them from time to time."

(The Board referred to in said Section was the Oregon State Board of Horticulture.)

That Section 18-2911, Oregon Laws of 1930, provides among other things as follows:

> "Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a container, any such horticultural product to which the standard is applicable, unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act. • • • Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or be imprisoned not more than one year or both."

Chapter 136, Oregon Laws of 1931, provided for the creation of a State Department of Agriculture, for the appointment of a Director of Agriculture; that the State Department of Agriculture should take over the duties and functions of the State Board of Horticulture and enforce the statutes involved in this case. The validity of this statute is not directly involved in this suit.

That Chapter 225, Oregon Laws of 1933, provides as follows:

> "Section 3. It shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the State of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the state of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed, and each container or package stamped, marked or labeled in conformity with such grades and regulations, except that such transportation be from the fields where grown to the packing house, canneries or by-product plants. It also shall be unlawful to prepare, deliver for shipment, ship, transport, offer for sale or sell a deceptive pack, or package, load, arrangement or display of fruits, vegetables and/or other horticultural products."

> "Section 8. Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than the sum of $20 nor more than $500 or by imprisonment in the county jail for a period not to exceed 60 days, or by both such fine and imprisonment."

(C) Dates.

The date of the order denying Plaintiff's application for an interlocutory injunction, and granting Defendants' motion to dismiss Plaintiff's amended bill of complaint, and which is sought to be reviewed, is December 21, 1934. The date of the final decree denying Plaintiff's prayer for a permanent injunction and dismissing the above entitled suit is February 27, 1935. The date upon which the application for appeal is presented is March 18, 1935.

Nature of Case.

This is a suit to enjoin the Defendants and appellees from enforcing the above described orders of the Department of Agriculture of the State of Oregon fixing standard containers for strawberries and raspberries, which orders were made pursuant to Section 18-2902 and Section 18-2911, Oregon Laws of 1930, and Sections 3 and 8 of Chapter 225, Oregon Laws of 1933, and Plaintiff seeks to enjoin the enforcement of said statutes in so far as they relate to strawberry and raspberry containers. The amended bill of complaint alleges that plaintiff and appellant is a California corporation and has been engaged in the business of manufacturing in the State of California containers for strawberries and raspberries, made of two thin strips of wood crossing each other to form the bottom and bent upwards to form the sides, reinforced with a narrow metal strip to protect the baskets and the contents and to insure uniformity of cubic measure. The baskets so constructed have openings to insure ventilation, and the cubic content is one pint. These baskets are known as tip-top berry baskets or cups. Plaintiff and appellant has sold such baskets in large quantities to dealers in Oregon for more than nine years and they are in common use in the United States. Appellant's case is based on the proposition that the Department of Agriculture of the State of Oregon, functioning through the Defendants, has adopted arbitrary, unreasonable and capricious standards for strawberry and raspberry containers in that the orders specify a single type of container of specific detailed dimensions (but not because the orders prescribe a certain capacity), made in a particular way, which because of the method of construction can only be made of a particular kind of wood which is not grown commercially except in the Northwest. Such orders outlaw

all other types of containers which were in general use, including the tin-top type manufactured by appellant. Appellant claims that the orders in question in so far as they relate to strawberry and raspberry cups are not reasonably necessary for the accomplishment of any legitimate purpose of the police power.

The statutes of the State of Oregon above referred to provide that when standard containers have been adopted, the sale of berries in the State of Oregon or the shipment for sale into the State of Oregon in other than the containers designated as standard, shall be illegal and those guilty of shipment or sale of berries in other than the standard containers shall be subject to fine or imprisonment. The Defendants, as officials of the State of Oregon, have taken steps to enforce said orders. The direct effect of the orders is to prevent dealers and producers from purchasing the type of berry container made by appellant and others, and to destroy appellant's business to that extent, thus depriving it of its property without due process of law.

Appellant challenges the constitutionality of the orders in question and the above statutes as noted, on the following grounds:

1. They deprive appellant of its property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution.

2. They deny to appellant the equal protection of the laws in violation of Section 1 of the 14th Amendment of the Constitution. The orders grant a monopoly to manufacturers of the so-called hallocks, and prevent the appellant and all others who manufacture and sell different types of berry cups from selling their products to producers and dealers in Oregon or who desire to ship berries into Oregon. The orders are unreasonably discriminatory in favor of the

so-called hallock and against all other types of cups, including those made by appellant.

3. The orders are void for the reason that they interfere with and impose unlawful burdens on interstate commerce and the business of appellant, contrary to and in violation of sub-division 3 of Section 8 of Article 1 of the Constitution.

Plaintiff and appellant, in both its bill and amended bill of complaint, asked for an interlocutory injunction as well as a permanent injunction restraining the enforcement and operation of the orders in question and of the statutes in so far as they purport to justify said orders. A restraining order was granted, and was in effect until the order was made denying the interlocutory injunction and dismissing Plaintiff's amended bill of complaint.

Citation of Cases Believed to Sustain the Jurisdiction.

The following is citation of the cases believed to sustain the jurisdiction of this Court on appeal:

Borden's Farm Products Company, Inc., v. *Charles H. Baldwin*, 79 L. Ed. (Adv. Opinions), 130; decided December 3, 1934, 55 S. Ct. 187.

Herkness v. *Irion*, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198.

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659.

Clark v. *Poor*, 274 U. S. 555, at 556, 47 S. Ct. 702, 71 L. Ed. 1199, at 1200.

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245, 48 S. Ct. 230, 72 L. Ed. 551.

Abuse of Discretion.

Appellant respectfully contends that the statutory three-judge court abused its discretion in denying its application for an interlocutory injunction because:

(a) The Court overlooked the fact that there was no denial of any of the allegations of the amended bill of complaint, or of the affidavits filed on behalf of Plaintiff, and the Court could not have considered all of the allegations of the amended bill and have reached the conclusion that the appellant was not entitled to an interlocutory injunction.

(b) The opinion of the Court shows that it assumed certain facts which were not in the record, and assumed certain facts to be matters of general knowledge, where there was no justification for such assumption. The following paragraph of the typewritten opinion illustrates this point:

> "It is a matter of general knowledge that enforced standardization of containers is essential to the economic handling, shipping and selling of horticultural products, for, among other reasons, it prevents fraud and deception in sales, provides the best method of stowage, and eliminates many sizes that complicate the problems of transportation."

(c) The Court relied too strongly on the proposition that since the legislature authorized a standard container law, all acts or orders passed thereunder are free from constitutional attack.

See particularly, *Borden's Farm Products Co.* v. *Baldwin*, 79 L. Ed. 130 (Advance Opinions), 55 S. Ct. 187.

For and by reason of the foregoing, it is respectfully submitted that this Honorable Court has jurisdiction of this appeal, by virtue of the provisions of Judicial Code Section 266 as amended.

Respectfully submitted,

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Solicitors for Appellant.

(6337-C)

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. ~~855~~ 48

PACIFIC STATES BOX AND BASKET COMPANY,
Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

REPLY TO STATEMENT OPPOSING JURISDICTION.

BYRON C. HANNA,
ARTHUR A. GOLDSMITH,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 955

PACIFIC STATES BOX AND BASKET COMPANY,
A CALIFORNIA CORPORATION,

Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, AND CHAS. A. COLE, AS CHIEF OF THE DIVISION OF PLANT INDUSTRY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF OREGON.

APPELLANT'S REPLY TO APPELLEES' STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THIS COURT ON APPEAL.

Appellant herewith replies to appellees' statement of matters making against the jurisdiction of this Court on appeal. The principal contention of appellees is as follows:

> "Appellees contend that this appeal does not present a case involving a substantial Federal question, for the reason that appellant, a foreign corporation, not licensed to do business in the State of Oregon, has no constitutional right to compel the State of Oregon to desist from prohibiting its citizens from using containers which do not conform to standards adopted by this State as a matter of public policy."

Appellees' sole contention is that the case does not involve a substantial Federal question. The test of what is a substantial Federal question was set forth by this Court in the recent case of *Hamilton* v. *The Regents of the University of California*, 79 L. Ed., Ad. Op., page 159 at 165, as follows:

> "And the appellees insist that this appeal should be dismissed for want of a substantial Federal question. That contention cannot be sustained for we are unable to say that every question that appellant has brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance."

Although appellees make the assertion that appellant is not licensed to do business in the State of Oregon, there is nothing in the record to warrant such statement. Appellees evidently brought in this issue at this point in order to try to sustain their particular point. There is nothing in the record showing that appellant is not legally engaged in doing business in the State of Oregon. Paragraph VII of the Amended Complaint, which must be taken as admitted on the motion of defendants to dismiss, alleges:

> "That for the past nine years plaintiff has sold strawberry and raspberry baskets and cups of its own manufacture, and as described above, to dealers in the State of Oregon in large quantities."

This case does not involve the terms or conditions upon which a foreign corporation may do business within a State. It does involve the question whether certain orders, promulgated under the alleged authority of certain statutes, are arbitrary, unreasonable and capricious and deprive plaintiff of its property without due process of law. It does involve the question of whether the particular or-

ders deny to plaintiff the equal protection of the laws by declaring as legal only the products manufactured by a certain group, and illegal products manufactured by plaintiff and others. It does involve the question whether such legislation is contrary to the commerce clause of the Constitution. These points go to the merits of this appeal and will be covered fully by briefs and oral argument in due course.

In objecting to the jurisdiction of this Court to hear this appeal, it is appellees' contention that a foreign corporation is disqualified from raising these points. It is submitted that such objection is without merit.

A foreign corporation is a "person" within the meaning of the due process and equal protection clauses of the 14th Amendment, and a foreign corporation which is permitted to do business in a State may not be subjected to State statutes in conflict with the Federal Constitution.

Louis K. Liggett Company v. *Baldrige*, 278 U. S. 105, 111, 73 L. Ed. 204, 208, 49 Sup. Ct. Rep. 57.

Kentucky Finance Corp. v. *Paramount Auto Exch. Corp.*, 262 U. S. 544, 550, 67 L. Ed. 1112, 1115, 43 Sup. Ct. Rep. 636.

Power Mfg. Co. v. *Saunders*, 274 U. S. 490, 493, 496, 497, 71 L. Ed. 1165, 1167, 1169, 47 Sup. Ct. Rep. 678.

A foreign corporation is within the scope of the protection afforded by the guaranty of due process of law in respect to its property.

Louis K. Liggett Company v. *Baldrige, supra.*

Kentucky Finance Corp. v. *Paramount Auto Exch. Corp., supra.*

Seaboard Air Line Railway Company v. *Railway Commission of Alabama*, 155 Fed. 792.

Chicago, Milwaukee & St. Paul Railway Co. v. *Harmon*, 89 Mont. 1, 295 Pac. 762.

A State may not exact, as a condition of a corporation engaging in business within its limits, that its rights secured to it by the Constitution of the United States may be infringed.

Hanover Fire Insurance Company v. *Carr*, 272 U. S. 494, 507, 71 L. Ed. 372, 379, 47 Sup. Ct. Rep. 179.

Metropolitan Casualty Insurance Co. v. *Brownell*, 79 Ad. Op. of L. Ed. 564, 566, decided March 18, 1935.

Power Manufacturing Co. v. *Saunders*, 274 U. S. 490, 494, 71 L. Ed. 1165, 1168, 47 Sup. Ct. Rep. 678.

Pullman Co. v. *Kansas*, 216 U. S. 56, 63, 54 L. Ed. 378, 384, 30 Sup. Ct. Rep. 232.

Terrall v. *Burke Construction Co.*, 257 U. S. 529, 66 L. Ed. 352, 21 A. L. R. 186, 42 Sup. Ct. Rep. 188.

Southern Railway Company v. *Greene*, 216 U. S. 400, 54 L. Ed. 536.

American Smelting & Refining Co. v. *Colorado*, 204 U. S. 103, 51 L. Ed. 393.

Appellant, a foreign corporation, is in a position to object that the orders and legislation involved in this case are void because they interfere with and impose unlawful burdens on the interstate commerce of plaintiff. If such orders are sustained, plaintiff as a practical matter will be unable to ship berry boxes from the State of California into the State of Oregon for sale and California berries cannot be shipped into the State of Oregon if packed in tin-top boxes and sold, without violating the orders and legislation challenged in this case.

Savage v. *Jones*, 225 U. S. 501, 524, 525, 56 L. Ed. 1182, 1191.

Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 203, 59 L. Ed. 193, 197, 35 Sup. Ct. Rep. 57.

Looney v. *Crane Co.*, 245 U. S. 178, 188, 62 L. Ed. 230, 235, 38 Sup. Ct. Rep. 85.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. Ed. 355, 30 Sup. Ct. Rep. 190.

It is submitted that this Court has jurisdiction on appeal to review the interlocutory order and final decree heretofore made by the statutory court of three Federal judges.

Respectfully,

BYRON C. HANNA,
ARTHUR A. GOLDSMITH,
Counsel for Appellant.

(6378-C)

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Supreme Court of the United States

October Term, 1935

No. 48

PACIFIC STATES BOX AND BASKET COMPANY, a California corporation,
Appellant,

vs.

S. T. WHITE, successor to Max Gehlhar, as Director of Agriculture for the State of Oregon, and FRANK McKENNON, successor to Chas. A. Cole, as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon,
Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Oregon.

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Supreme Court of the United States

October Term, 1935

No. 48

PACIFIC STATES BOX AND BASKET COMPANY, a California corporation,
Appellant,

vs.

S. T. WHITE, successor to Max Gehlhar, as Director of Agriculture for the State of Oregon, and FRANK McKENNON, successor to Chas. A. Cole, as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon,
Appellees.

BRIEF OF APPELLANT

Appeal from the District Court of the United States for the District of Oregon.

REPORT OF CASE BELOW

The official report of the opinion delivered in the above entitled case in the United States District Court for the District of Oregon, is reported in 9 Fed. Supp. 341 under the title of Pacific States Box and Basket Company, a California corporation, Plaintiff, v. Max Gehlhar as Director of Agriculture for the State of Oregon, and Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, Defendants. The opinion appears in the printed record on page 28.

JURISDICTION OF COURT

The appellant has complied fully with Paragraph 1 of Rule 12. See printed Statement as to Jurisdiction and Reply to Statement Opposing Jurisdiction, on file.

STATEMENT OF CASE

Appellant, Pacific States Box and Basket Company, is a California corporation engaged in that state in the business of manufacturing and selling fruit and vegetable baskets and other containers, as well as berry cups. The original defendants were Max Gehlhar as Director of Agriculture for the State of Oregon, and Chas. A. Cole as Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon. Since this appeal was taken, Max Gehlhar has resigned as Director of Agriculture and Chas. A. Cole has resigned as Chief of the Division of Plant Industry, and S. T. White is now the duly qualified and acting Director of Agriculture for the State of Oregon, succeeding Max Gehlhar on or about April 1, 1935, and Frank McKennon is now the duly qualified and acting Chief of the Division of Plant Industry of the Department of Agriculture for the State of Oregon, succeeding Chas. A. Cole on or about May 1, 1935. There is on file with the Clerk of this Court Appellant's motion to proceed with the appeal against the successors in office of the original defendants and appellees, together with a stipulation providing for the substitution of appellees and for continuance of appeal, the motion showing that there is substantial need for continuing and maintaining this appeal and obtaining an adjudication of

the questions involved therein. For the purpose of simplicity, we will consider as the appellees and as the defendants in the court below the particular officials, that is, the Director of Agriculture and the Chief of the Division of Plant Industry, without reference to the change in personnel of these offices.

This is a direct appeal from the United States District Court for the District of Oregon, sitting as a statutory court of three judges, denying plaintiff's application for an interlocutory injunction and granting defendants' motion for a dismissal of the complaint, and from a final decree denying plaintiff's prayer for a permanent injunction and dimissing the above entitled suit.

The amended bill of complaint and the affidavits of Herman Paine are not controverted. No affidavits have been filed by the defendants. The facts below outlined are alleged in the amended bill of complaint or are contained in the affidavits of Herman Paine.

This is a suit to enjoin the appellees from enforcing certain orders of the Department of Agriculture of the State of Oregon fixing standard containers for strawberries and raspberries. (The pertinent parts of these orders are set forth below.) These orders were made pursuant to *Section 18-2902 and Section 18-2911, Oregon Laws of 1930, and Sections 3 and 8 of Chapter 225, Oregon Laws of 1933*, and appellant seeks to enjoin the enforcement of these statutes insofar as they relate to strawberry and raspberry containers. The above statutes are set forth in

an appendix to this brief. The amended bill of complaint alleges that appellant is a California corporation and has been engaged in the business of manufacturing in the State of California containers for strawberries and raspberries, made of two thin strips of wood crossing each other to form the bottom and bent upwards to form the sides, reinforced with a narrow metal strip to protect the baskets and the contents and to insure uniformity of cubic measure. The baskets so constructed have openings to insure ventilation, thus tending to prevent decay, and allowing a prospective customer to see the contents, and the cubic content is one pint. The baskets made by appellant do not have a false, raised, or set-up bottom. These baskets are known as tin-top berry baskets or cups. Appellant has sold such baskets in large quantities to dealers in Oregon for more than nine years and they are in general use in the United States. The packing of strawberries or raspberries in tin top baskets as herein described is conducive to the preservation of the berries contained therein, to honest measurements, and to fair dealing with purchasers. (R. 4 and 5.)

At this point, we will set forth those parts of the orders made by the appellees against which appellant is invoking the aid of this Court:

"RASPBERRIES

Crate—24-pint hallocks,.....Size of hallock, 2x5¼x5¼ inches, outside measurements. Bottom set up ¾ inch, inside depth 1¼ inches.

STRAWBERRIES

Crate—24-pint hallocks,.....Size of hallocks, $2\frac{1}{2}$x$4\frac{3}{8}$ inches outside measurements, bottom set up $\frac{3}{4}$ inch, inside depth $1\frac{3}{4}$ inches.

"As provided by sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, the above mentioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material.

"Done in the office of the Department of Agriculture, State of Oregon, Salem, Oregon, this the third day of May, 1933. I hereby designate the Department of Agriculture Bulletin as the publication in which said Order shall be published.

CHAS. A. COLE, Division Chief.

Approved,

MAX GEHLHAR,
Director of Agriculture."

The above quotation was taken from a pamphlet entitled "Standard Containers for Fruits and Vegetables", Exhibit A of Plaintff's Amended Bill of Compaint. (R. 12 and 13.) The same material so far as it relates to the specifications of containers for strawberries is found in Plaintiff's Exhibit B attached to its Amended Bill of Complaint. (R. 13, 14 and 15.)

Wherever these orders are referred to hereinafter in this brief only those parts of the orders dealing with the

specifications for strawberry and raspberry containers is under consideration.

A hallock is one type of berry cup manufactured of rotary-cut veneer taken directly from spruce logs. (See top of page 3 of affidavit of Herman Paine dated June 15, 1934.) (R. 26.)

It is alleged in Paragraph V of the Amended Complaint (R. 4) that the appellees have taken steps to enforce the objectionable orders and have warned Oregon dealers not to use the tin-top cup or basket, and have advised appellant that such type of cups or baskets are not legal in Oregon.

In Paragraph VII there is the following language:

> "That the right to continue to sell such tin top berry baskets or cups to dealers in the State of Oregon is of great value to Plaintiff, far exceeding in amount the sum of $3,000.00. That Plaintiff also sold a very large number of said baskets or cups to dealers in California for packing strawberries and raspberries for sale in Oregon." (R. 5)

In the same paragraph of the complaint, it is alleged that the orders complained against were made and promulgated arbitrarily, capiciously and unlawfully in that they limit the type of strawberry and raspberry containers to the so-called hallock, and that they specify certain definite dimensions, and provide that the baskets must have a bottom set up ¾ of an inch. It is alleged that the effect of the said orders is to prevent the sale by appellant and other manufacturers of the tin top type of containers

or cups with solid bottoms in this state. There is the further allegation that the machinery of appellant cannot manufacture the type of basket or hallock described in the above mentioned orders without expensive change. The affidavit of Mr. Herman Paine dated June 15, 1934, (R. 26), states that the value to appellant of its established business in the sale of tin-top baskets or cups to dealers in the State of Oregon for use as strawberry or raspberry containers is at least $50,000.00; that the net receipts from sales of such baskets for 1932 and 1933 to dealers in Oregon was $6699.62 after deducting allowances for freight to Oregon dealers and that it would cost Appellant at least $25,000.00 to install the necessary machinery to manufacture hallock baskets in quantities equivalent to its average sales of tin-top baskets in the State of Oregon during the past two years. The amended bill of complaint further alleges that the basket provided by the orders under attack can be made only of spruce which is grown only in the Pacific Northwest. (R. 6.) It is further alleged that the so-called hallock is not the type of berry basket in general use throughout the United States, nor are the particular dimensions stated in the orders generally recognized as standard. Paragraph VIII of the amended complaint contains the following language:

> "That there is no necessity for the particular orders relating to strawberries or raspberries as set forth in Exhibit A and Exhibit B based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described as a hallock of the size and kind provided for strawberries and raspberries in said orders Exhibit A and Exhibit B does

not of necessity promote, protect, further or develop the horticultural interests of the State of Oregon." (R. 6)

Paragraph IX of the amended complaint sets forth that the necessary effect of the orders in question is to grant a monopoly to manufacturers of the so-called hallocks. (R. 26.)

As these allegations are not denied, they must be taken as admitted.

Appellant claims that the orders in question insofar as they relate to containers for strawberries and raspberries, are unlawful and void, because:

1. They deprive Appellant of its property without due process of law in violation of Section 1 of the 14th Amendment of the Constitution of the United States, in that the tin-top baskets made by Appellant (as well as others), cannot be used for packing strawberries or raspberries for sale in the State of Oregon without making the users liable to arrest and subject to fine and imprisonment. The necessary effect of said orders is to prevent Appellant from making sales to those who desire and formerly used this type of basket or cup. The orders arbitrarily interfere with the legitimate business of Appellant. The orders grant a monopoly to manufacturers of hallocks and prevent the Appellant and all others who manufacture and sell different types of berry cups from selling their product to producers and dealers who desire to ship berries into Oregon, as well as to Oregon dealers and producers who desire to use tin-top berry cups or other recognized types of berry cups. The orders are unreasonably discriminatory

in favor of the hallock and against all other types of berry cups, including the tin-top cups made by Appellant.

2. The orders are void for the reason that they interfere with and impose unlawful burdens on the interstate commerce and business of Appellant, contrary to and in violation of *subdivision 3 of Section 8 of Article 1 of the Constitution of the United States.* Appellant is prevented by said orders from obtaining business from dealers in Oregon for baskets manufactured by it in California, and its sales to dealers and producers in California packing California berries for sale in Oregon, are interfered with because it is illegal to sell any berries in the State of Oregon irrespective of where they originate, if packed in other than standard containers. Said orders were arbitrarily made by appellees and have the effect of legislation which arbitrarily and unjustly discriminates against products made in another state in favor of a product which can be made only in the Northwest.

3. *Section 18-2902, Oregon Code of 1930,* the statute under which the orders were made, is an unconstitutional delegation of authority to administrative officials.

SPECIFICATIONS OF ERRORS

The Appellant intends to urge the following assigned errors (R. 36 et seq.):

I.

The Court erred in refusing to enjoin the defendants and their successors in office in their official capacities as

heads of the Department of Agriculture for the State of Oregon, from enforcing orders of said Department fixing standard containers for strawberries and raspberries, which orders provided that the standard containers for such berries shall be: "Raspberries: Crate—24-pint hallocks, 5 1/8 inches deep, 16 5/8 inches wide, and 23 1/4 inches long, all inside measurements. Center partition 3/4 inches, ends and partition grooved for double deck. Size of hallock, 2x5 1/4x5 1/4 inches, outside measurements. Bottom set up 3/4 inch, inside depth 1 1/4 inches." "Strawberries: Crate—24-pint hallocks, 6 3/8 inches deep, 13 3/4 inches wide, and 19 1/4 inches long, all inside measurements. Half inch center piece. Size of hallocks, 2 1/2x4 3/8x4 3/8 inches outside measurements, bottom set up 3/4 inch, inside depth 1 3/4 inches." The first of these orders was dated May 3, 1933, and entitled "Standard Containers for Fruits and Vegetables" and the other order was dated June 1, 1933, and entitled "Oregon Standards for Strawberries (1933)", the material parts of said orders so far as they relate to raspberries and strawberries being the same. Said orders are attached to and made a part of Plaintiff's amended bill of complaint as Exhibit A and B thereof.

II.

The Court erred in failing to enjoin the enforcement of *Section 18-2902 and Section 18-2911, Oregon Code of 1930* (the official publication and compilation of the general laws of Oregon) and *Section 3 and Section 8 of Chapter 225, Oregon Laws of 1933* (which was officially published by the State of Oregon under such title) insofar as

they purport to sustain the orders mentioned in Assignment of Errors No. I and make the violation thereof unlawful and punishable. These statutory provisions are set forth in full in Paragraph IV of plaintiff's amended bill of complaint.

III.

The Court erred in failing to hold that the orders in question are arbitrary, capricious and unlawful as they relate to strawberry and raspberry containers.

IV.

The Court erred in refusing to hold that the said orders above referred to and the statutory provisions under which they were issued, insofar as they relate to strawberry and raspberry containers, were void as being in conflict with *Section 1 of the 14th Amendment of the Constitution of the United States*, and in failing to hold that said orders deprive Plaintiff of its property without due process of law.

V.

The Court erred in refusing to hold that said orders and the statutory provisions above referred to were void and were in conflict with *sub-section 3 of Section 8 of Article 1 of the Constitution of the United States* in that they interfere with and impose unlawful burdens on the interstate commerce and business of the Plaintiff.

VI.

The Court erred in refusing to hold that the orders above mentioned and the statutory provisions above set forth, insofar as they purport to sustain such orders, relating to raspberry and strawberry containers, are violative of the constitutional rights of Plaintiff.

VII.

The Court erred in denying Plaintiff's application for an interlocutory injunction enjoining the enforcement of the orders and statutory provisions cited in Assignment of Errors No. I and II hereof, in that the amended bill of complaint and the supporting affidavits were not denied, and said amended bill of complaint and affidavits set forth facts showing the said orders and statutory provisions, in question to be unconstitutional.

VIII.

The Court erred in granting defendants' motion to dismiss plaintiff's amended bill of complaint in that said amended bill of complaint did state sufficient facts to warrant the issuance of an injunction against the orders and statutes, which were clearly shown to be unconstitutional.

X.

The Court erred in entering a final decree dismissing plaintiff's suit and denying its application for a permanent injunction in that such action was taken without the in-

troduction of any testimony, and where the record consisted of plaintiff's amended bill of complaint and uncontradicted affidavits in support of its application for an injunction, which amended bill of complaint alleged sufficient facts to warrant the conclusion that the orders were clearly arbitrary, unreasonable and capricious, and therefore unconstitutional and void.

ARGUMENT

SUMMARY OF ARGUMENT

I. The Orders are Void Because they Deprive Appellant of its property without Due Process of Law.

(a) A going business is a valuable property right and entitled to Constitutional Protection.

(b) There is a difference between Legislative determination and an order of an Administrative Official.

(c) Legitimate bounds of Police Power.—Review of illustrative cases.

(d) Factual analysis of Orders.

1. The type of cup specified in the orders does not prevent fraud.
2. The specified cups do not preserve the public health.
3. They do not promote public welfare.
4. The orders do provide for a monopoly.

(e) The presumption of constitutionality of acts of legislature is rebuttable.

(f) The orders are arbitrary, capricious and unreasonable.

(g) Official containers are invalid because they differ from standards approved by Congress.

(h) There is only a rebuttable presumption of Constitutionality for Acts of Legislature.

II. The Orders in question are void because they interfere with and impose unlawful burdens on the Interstate Commerce of Appellant.

III. The statute, under the authority of which the challenged orders were made, constitutes an unlawful delegation of authority to administrative officials.

IV. Conclusion.

I. THE ORDERS ARE VOID BECAUSE THEY DEPRIVE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

(a) A Going Business is a Valuable Property Right.

The necessary effect of the orders in question is to deprive appellant of its valuable business in the State of Oregon, because dealers who were formerly purchasing such baskets from the appellant have been warned by officials of the State Department of Agriculture that they would not be allowed to sell strawberries or raspberries in any container other than the standard containers described in the orders. The natural result was that they were afraid to purchase baskets made by appellant which were of a different type than specified as the standard. The effect of the orders is thus to deprive appellant of its

business. (R. 6, 7.) That a going business is a valuable property right which is entitled to constitutional protection is clear.

> "That appellant's business is a property right (Duplex Printing Press Co. v. Deering, 254 U. S. 443, 465, 65 L. ed. 349, 356, 16 A.L.R. 196, 41 Sup. Ct. Rep. 172; Truax v. Corrigan, 257 U. S. 312, 327, 66 L. ed. 254, 260, 27 A.L.R. 375, 42 Sup. Ct. Rep. 124), and as such entitled to protection against state legislation in contravention of the Federal Constitution, is, of course, clear."
>
> Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 111, 73 L. ed. 204, 208, 49 S. Ct. 57.

> "Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."
>
> Pierce v. Society of Sisters, 268 U. S. 510, 536; 69 L. ed. 1070, 1078, 45 S. Ct. 571.

(b) Difference Between Legislative Determination and Order of Administrative Official.

This case raises the issue of how far an *administrative official* can go in fixing specifications for official containers and outlawing all containers which do not comply with such specifications.

The orders under attack were not made by the Legislature, but by an administrative official and there is no showing of any supporting evidence. Furthermore, the

statutes under which the purported authority is derived, make no provision for appeal.

> "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the Legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."
>
> Southern Railway Co. v. Virginia ex. rel. Shirley, 290 U. S. 190 at 197, 78 L. ed. 260 at 266, 54 S. Ct. 148.

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determination of facts, those determinations must be shown."
>
> Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. Ad. Op. 223, 238, 55 S. Ct. 241.

In the Court below, counsel for appellees argued that the orders were adopted after full hearing and consideration of the subject by parties interested. There is nothing in the record except the amended bill of complaint and exhibits attached, and the affidavits of Herman Paine. While it is true that one of the orders states that a public hearing was held in Portland under date of April 15, 1933, all that is noted is that the hearing was to consider standard containers and that certain standard containers were considered and recommended. (R. 10.) There is no finding of fact as to why the particular containers were recommended, why the detailed specifications were adopted, and why the hallock was adopted and all other

types of berry boxes were outlawed. There is nothing to show who was present at the hearing, what notice was given or even whether the majority present recommended other containers. There is nothing to show why the particular specifications further or promote horticultural interests of the State of Oregon.

There must be an ascertainment of facts after hearing and investigation before an administrative officer can act.

> Wichita Railroad Co. v. Public Utilities Commission, 260 U. S. 48; 67 L. ed. 124 at 130.
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> Mahler v. Eby, 264 U. S. 32 at 44, 68 L. ed. 549 at 556.
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> Panama Refining Co. v. Ryan, supra.

While there is a rebuttable presumption of fact as to the constitutionality of an act of the legislature (Borden's Farm Products Co. vs. Baldwin, 79 L. ed. Ad. Op. 130), there is no such presumption of constitutionality or validity of an order of an administrative official.

> Southern Railway Co. v. Virginia, supra.

It is submitted that in challenging orders of the appellees, appellant is not required to make as strong a showing as if the orders establishing the specific standards were the act or acts of the Legislature. But even though the orders in question were made by the legislature, the determination of what constitutes proper exercise of the police power is not final or conclusive but is subject to supervision of the courts.

(c) Legitimate Bounds of Police Power.

This Court has given frequent expression to the legitimate bounds of the police power. The following are illustrative statements of the general principles involved:

Mugler v. Kansas, 123 U. S. 623 at 661, 31 L. ed. 205 at 210, 8 S. Ct. 273: "The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385 at 388, 14 S. Ct. 499: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

Welch v. Swasey, 214 U. S. 91, 105, 53 L. ed. 923 at 929, 29 S. Ct. 567: "The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish or aid in the accomplishment of, some purpose for which the

legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, if the statutes are arbitrary and unreasonable, and beyond the necessities of the case, the courts will declare their invalidity."

Burns Baking Co. v. Charles Bryan, 264 U. S. 504, 68 L. ed. 813 at 826, 44 S. Ct. 412: "But a state may not, under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them. Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Meyer v. Nebraska, 262 U. S. 390, 399, 67 L. ed. 1042, 1045, 29 A.L.R. 1446, 43 Sup. Ct. Rep. 625. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted."

Meyer v. Nebraska, 262 U.S. 390, 399, 67 L. ed. 1042 at 1045, 43 S. Ct. 625: "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499."

New State Ice Co. v. Liebmann, 285 U. S. 262 at 278, 76 L. ed. 747 at 754, 52 S. Ct. 371 at 375: "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld in consistence with the Fourteenth Amendment. Under that Amendment, nothing is more clearly settled than that it is beyond the power of a state 'under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them'."

Nashville, Chatanooga & St. Louis Railway Co. v. Walters, 79 L. ed. Ad. Op. 458 at 461: "The police power is subject to the constitutional limitation that it may not be exercised arbitrarily or unreasonably."

Washington ex. rel. Seattle Title & Trust Co. v. Roberge, 278 U. S. 116, 73 L. ed. 210 at 213, 49 S. Ct. 50: "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activity."

Panhandle Eastern Pipe Line Co. v. State Highway Commission, 79 L. ed. Ad. Op. 614 at 617: "A claim that action is taken under the police power of the state cannot justify disregard of constitutional inhibition. • • • "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." (Page 619.)

The above cases decided by this Court are cited primarily as laying down the general principles and not because they deal with facts substantially similar to the facts in the case at bar. The case of *Mattei v. Hecke,* 99 Cal. App. 747, 279 Pac. 470, deals with the fruit standardization act of the State of California and is closely in point on the facts. It involved the constitutionality of a portion of the California Fruit, Nut and Vegetable Standardization Act of 1927, which provided among other things that unless grapes were packed in certain standard containers, the container should be marked "irregular container". The plaintiff was a large grape grower and shipper who had been warned by the Department of Agriculture that the use of certain lug boxes of dimensions different than those authorized under the California Act must be marked "irregular container", and that legal proceedings would be instituted against him if he persisted in using other than standard boxes. He then filed a complaint for an injunction seeking to restrain the Director of Agriculture of the State of California and the Horticultural Commissioner of Fresno County from prosecuting him or preventing him from packing his grapes in the containers that he was actually using. The Court below granted a temporary injunction, from which order the appeal was taken. After a full discussion of the relative rights of the citizens of the State and the exercise of the police power, the Court held the Act unconstitutional.

Another recent case which deals with the question of packing of fruit is *Inman v. Sandvig,* 170 Wash. 112, 15 Pac. (2nd) 696. In that case the plaintiff, having an

established apple growing business in Yakima County in the State of Washington, commenced an action seeking injunctive relief against the Prosecuting Attorney and other officials charged with the enforcement of a certain horticultural statutory provision and the rules and regulations adopted and promulgated in pursuance thereof. The case was tried upon the merits.

> "We are of the opinion that the rule adopted and promulgated by the director of agriculture on August 1, 1932, with reference to third grade apples, in so far as that rule provides that third grade apples 'shall not be wrapped nor packed nor lidded in a standard apple box of the state of Washington,' is unreasonably discriminatory as against third grade apples in favor of first and second grade apples, and in violation of section 3, article 1, of our state Constitution, providing that 'no person shall be deprived of life, liberty, or property without due process of law', and section 12, article 1 of our state Constitution, providing that 'no law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations'. The word 'law', as used in this section, manifestly includes a rule made by any administrative authority, as well as a law made by direct legislative authority. Our conclusion seems to us so plainly correct as to render it unnecessary to call for any extended review or citation of the many court decisions and texts supporting it. The controlling principles are well stated in general terms in the text of 6 R.C. L. 196 as follows: 'The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without

which property cannot be conceived. Hence a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives an owner of one of its essential attributes, or destroys its value, or restricts or interrupts its common, necessary or profitable use, or hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it, and thereby seriously impairs its value. These general principles apply not only to statutes enacted by the legislature but to the action of executive officers generally.'

"Our conclusion therefore is that appellants are entitled to injunctive relief restraining the respondents from enforcing the rule adopted and promulgated by the director of agriculture on August 1, 1932, in so far as that rule provides that third grade apples "shall not be wrapped nor packed nor lidded in a standard apple box of the state of Washington." (Page 698.)

The Oregon Supreme Court on October 1, 1935, rendered its decision declaring unconstitutional the State Agricultural Adjustment Act, in the case of *I. H. Van Winkle, et. al. vs. Fred Meyer, Inc., et. al.* (Not yet in printed form. Copies of the decision will be supplied as soon as published.) The suit was instituted by the plaintiffs to restrain defendants from violating a certain state ice cream marketing agreement adopted pursuant to the State Agricultural Adjustment Act of 1933 as amended in 1935. The Act is very similar to the Federal Agricultural Adjustment Act and provides

that widespread agricultural distress exists causing disorganization of trade and industry and effecting the public welfare and that in order to promote the rehabilitation of agriculture, it is the policy of the state to cooperate with the national government in the declared purposes and policy of the National Agricultural Adjustment Act and to that end to permit and encourage a formulation of and provide for the enforcement of marketing agreements among producers, manufacturers, distributors and others, handling or processing within the State of Oregon any agricultural product produced or marketed within the state. After an extended discussion of whether the Act was an unconstitutional delegation of authority, and the Court so held (we will comment on this point at a later point in this brief), the Court discussed the matter as to whether the Legislature had authority to enact the legislation under the police power. The following are quotations from the opinion of the Court:

> "The next question presented is: Does the legislature of this state have the authority to enact a law fixing the price of agricultural products or regulating and restricting the production and sale thereof, or authorize that to be done by some subordinate state agency? It should be noted in this connection that this act is not a sanitary measure, nor was it designed to prevent the manufacture or sale of any impure food product. Its sole purpose was to raise the price of agricultural products in this state and obviously to restrict the amount which could be produced or sold, and this, we think, was entirely beyond the legislative power. *No one, we think, would seriously contend that farming is a business affected with a public interest, nor can it be contended that the business of processing and selling farm products is affected with*

a public interest. (Italics ours.) The merchant can hardly be said to have devoted his store and its contents to a public use when he sells or offers to sell some agricultural product or some derivative thereof. The same is true of persons engaged in processing and preparing such products for human consumption. The legislature, under the police power, may pass any reasonable sanitary law to protect the public from the sale of impure or deleterious food products, but this act was not designed for that purpose, nor does it have that effect, and hence it does not come within the police power of the state since the business and industry covered by this act are not affected with a public interest and none of the property used in such business or industry has ever been devoted to a public use. The law upon this question is clearly stated in Williams v. Standard Oil Co., 278 U. S. 235, 239, as follows:

> 'It is settled by recent decisions of this court that a state legislature is without constitutional power to fix prices at which commodities may be sold, services rendered, or property used, unless the business or property involved is "affected with a public interest." Wolff Co. v. Industrial Court, 262 U. S. 522; Tyson & Brother v. Banton, supra; Fairmont Co. v. Minnesota, 274 U. S. 1; Ribnik v. McBride, 277 U. S. 350. Nothing is gained by reiterating the statement that the phrase is indefinite. By repeated decisions of this court, beginning with Munn v. Illinois, 94 U. S. 113, that phrase, however it may be characterized, has become the established test by which the legislative power to fix prices of commodities, use of property, or services, must be measured. As applied in particular instances, its meaning may be considered both from an affirmative and a negative point of view. Affirmatively, it means that a business or property, in order to be affected with a public interest, must be such or be so employed as to justify the con-

> clusion that it has been devoted to a public use and its use thereby in effect granted to the public. Tyson & Brother v. Banton, supra, p. 434. Negatively, it does not mean that a business is affected with a public interest merely because it is large or because the public are warranted in having a feeling of concern in respect of its maintenance. Id., p. 430. The meaning and application of the phrase are examined at length in the Tyson case and we see no reason for restating what is there said'."

We believe that the opinion of the highest court of the state whose statutes are the subject of this suit should prove strongly persuasive. The Oregon Supreme Court holds that farming is not a business affected with a public interest. Therefore, the statute which we are attacking, *Section 18-2902, Oregon Code, 1930*, cannot be sustained on the theory that the horticultural interests of the state are affected with a public interest. Appellees therefore cannot rely on the police power, except in the field generally recognized, such as for the protection of the public health or for purposes of preventing fraud, and the amended complaint clearly alleges facts to show that the standard containers provided by the orders under attack do not preserve the public health or prevent fraud.

(d) Factual Analysis of Orders.

We will now examine the orders in question in the light of the above authorities. To sustain the above orders, it must be shown that they are necessary to prevent fraud or deception of the public, or to protect the public health, or to promote the public welfare, because obviously the

public morals are not involved. It must be further shown that the orders are reasonably necessary to effect the object sought to be accomplished. Furthermore, as was said in *Willoughby on the Constitution* (2nd Ed.) at page 1778:

> "The police power may not be employed to prevent evils of a remote or highly problematical character nor may its exercise be justified when the restraint imposed upon the exercise of private rights is disproportionate to the amount of evil that will be corrected."

Section 18-2902, Oregon Code, 1930, provides that standards for containers of horticultural products may be promulgated to promote, protect, further and develop the horticultural interests of the state. But it follows naturally that the standards must be reasonable. The amended bill of complaint in Paragraph VIII (R. 6) alleges that there is *no necessity for the particular orders relating to strawberries and raspberries as set forth in Exhibit A and Exhibit B based on consideration of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described as a hallock of the size and kind provided for strawberries and raspberries in said orders Exhibit A and Exhibit B does not of necessity promote, protect, further or develop the horticultural interests of the State of Oregon.* This allegation of the amended complaint is not controverted and must be considered as admitted. No denial was made by the appellees and no affidavit was introduced by appellees on the hearing for the interlocutory injunction setting

forth in what way the particular orders promote, protect, further or develop the horticultural interests of the State of Oregon.

As a matter of fact, the horticultural interests of the State got along very nicely before the passage of this statute and there is no showing that the orders promulgated under it have promoted, protected, further or developed such interests.

Even though we were to concede, for the purpose of this argument, that the adoption of certain standards would promote the public welfare and therefore be justified, nevertheless the standards that were adopted would be subject to the scrutiny of this court if an attack were made on the ground that they deprived appellant of its property without due process of law.

Now let us examine the specifications of the orders in question as they relate to the strawberrey and raspberry cups. The orders provide for a pint hallock. We do not question the reasonableness of the standards so far as the *capacity* of the container is concerned. A number of statutes provide for containers of a definite capacity, and it is quite clear that the adoption of a well recognized capacity such as a pint would have the tendency to prevent fraud. But we challenge the orders on the ground that the *hallock cup or basket type* is specified and the tin-top or metal rim cup, such as is manufactured by the appellant and others, and which was in general use at the time of the adoption of the orders, is outlawed, as well as all other types except the hallock.

1. *The type of cup specified in the orders does not prevent fraud or deception of the public.*

(a) First, so far as cubic contents are concerned: The amended complaint alleges that the cup made by plaintiff contains a dry pint and has a reinforced metal top, insuring uniformity of cubic measure. Such baskets also have a solid and not a false bottom. Under the circumstances, it cannot even be urged that the so-called hallock described in the orders better protects the public from fraud or deception as far as cubic contents are concerned than do the tin-top baskets such as are manufactured by plaintiff. *As a matter of fact, the hallock is itself a deceptive container.* It has a raised or false bottom. This may become wedged in such a way that the inside depth is considerably less than the standard, or in selling berries to customers the salesman may push up this loose bottom, thus indicating a very full box where as a matter of fact the box is not full. Another opportunity for fraud is to turn the boxes upside down and place a number of them in the middle of the crate. The shallow tops will hold two rows of berries and the deception cannot be discovered until the crate is unpacked. Furthermore, the customer thinks he is receiving a quantity of berries based on the exterior of the box and may overlook the fact that it has a raised-up bottom. Incidentally, the baskets or cups specified in the orders give only the approximate cubic content because all dimensions except the depth are *outside* dimensions. See particularly the discussion on this matter of approximate content in *Mattei v. Hecke*, supra, in which the California court commented that the standards set forth in

the California Act for grapes were only approximate in that outside measurements were used.

(b) Does the type adopted as standard allow the customer to see the quality of the fruit as easily as the tin-top and other types, and thus prevent deception? The answer is obviously "no". The hallock has no opening at the corners as has the tin-top berry cup. Through the openings at the corners in the tin-top cup, the prospective purchaser can see the quality and size of the fruit without upsetting the container and not merely what is on top.

2. *As to the preservation of public health*: Another legitimate justification for adopting a standard container would be that the berries will be better preserved in the standard container than in other types which have been rejected by the orders. On this point, reference is made to Paragraphs VI and VIII of the amended bill of complaint (R. 4, 5, 6) in which it is alleged that the baskets manufactured by plaintiff have an opening at each of the corners so that the berries therein contained are amply ventilated, thus tending to prevent the berries from decaying. The fact that the bottoms of the tin-top boxes are smaller than the tops allow ventilation between the boxes in the crate. It is further alleged in such paragraph that the manner of packing strawberries and raspberries in metal-top baskets or cups as described is conducive to the preservation of the berries contained therein, to honest measurement, and to fair dealing with purchasers. The hallock described in the orders involved has no such slits on the corners or at any place on the sides and the berries

are not ventilated. There is no ventilation between boxes in the crates as the hallocks fit snugly up against each other. It consequently follows that the orders cannot be justified on the ground that they preserve the public health.

3. *As to the promotion of the public welfare:* There is nothing to show how the adoption of the particular standards promote the public welfare. The fact that irregular sizes are eliminated and thus simplify the problems of transportation is a matter of purely private concern, and one which the growers and shippers should be free to solve in any manner they see fit.

As was said in the case of *Weaver v. Palmer Bros.*, 270 U. S. 402, 415, 70 L. Ed. 654, 658, the constitutional guaranties may not be made to yield to mere convenience.

4. *Orders provide for a monopoly.*

The orders under attack grant a monopoly to manufacturers of hallocks and deprive appellant and others of the market for berry boxes of the types which they previously manufactured and sold. The hallock can only be made of spruce which is grown only in the Pacific Northwest, thus limiting the monopoly to manufacturers in that area and excluding all others from the field. (See Amended Bill of Complaint, Paragraph VIII and Paragraph XI (R. 6 and 7).

The following statement is made by Herman Paine in his affidavit of June 15, 1934 (R. 26):

> "That hallock baskets of the type required by the regulations complained of in the above entitled suit as standard containers for strawberries and rasp-

berries, are made of rotary cut veneer, taken directly from spruce logs; that such spruce logs are not available at or near the plant of the plaintiff corporation and cannot be transported thereto except at prohibitive cost;"

Instead of promoting, protecting, furthering and developing the *horticultural* interests of the State, the orders in question promote, protect, further and develop the *manufacturers of hallocks.* That is not what the statute provided for, although that is the obvious effect of the orders.

The orders are unreasonably discriminatory in favor of the hallock type of basket and against all others, including the tin-top basket made by plaintiff. As we have pointed out, there is no reasonable basis for such discrimination. Why limit the type of containers in which berries can be sold in the State of Oregon to the hallock type of basket? There is certainly no evidence or finding to answer this question.

A case very closely in point is *State v. Santee,* 111 Iowa 1, 82 N. W. 445, 82 A. S. R. 489, 53 L. R. A. 763. The material part of the statute under which the defendant was prosecuted reads as follows:

"If any person 'sell or offer for sale or use any product of petroleum for illuminating purposes which will emit a combustible vapor at a temperature of less than 105 degrees, standard Fahrenheit thermometer, closed test, * * * except that the gas or vapor thereof shall be generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum * * * when used in the Wels-

bach hydrocarbon incandescent lamp * * * he shall be punished,' etc., Code, paragraph 2508."

The Court said:

"Exclusive privileges and franchises may, no doubt, be granted when absolutely necessary to insure safety to the people, but not otherwise. See Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394. In this case the parties agreed, however, that there are other lamps, operated on the same general principles as the Welsbach, that are equally safe, and that secure the same results. This being true, the legislature has no power to select one and reject the other. To do so would be to create the most odious of monopolies. The statute under consideration was enacted in virtue of the police power of the state but the legislature cannot under this guise create a monopoly. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; State ex rel Atty. Gen. v. Cincinnati Gaslight & Coke Co., 18 Ohio St. 262; Hudson v. Thorne, 7 Paige 261; Norwick Gaslight Co. v. Norwick City Gas Co., 25 Conn. 17. The business of manufacturing lamps, or the use of gas or vapor for illuminating purposes, is not unusual, and does not depend primarily on governmental permission. Defendant would have the right to use any lamp and kind of gas or vapor he chose for the purposes of lighting his building, in the absence of some police regulation imposed by the legislature; and a law that required him to use a particular lamp, when others equally safe were in the market, would be a violation of his constitutional rights, and would also give to the manufacturer special privileges over others producing equally meritorious lamps."

Another case in point is *Ex parte Hayden*, 147 Cal. 649, 82 Pac. 315, 1 L. R. A. (N. S.) 184, 109 A. S. R. 183. In that case the statute provided that the containers

for certain fruit should set forth a statement truly and correctly designating the County and immediate locality in which the fruit was grown. The Court said:

> "It is plain, therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems quite apparent that the true purpose of the act was to obtain for the fruit-raisers of some well-advertised and favored localities, an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in People v. Hawkins, 157 N. W. 1, 68 Am. St. Rep. 736, 51 N. E. 257, forms no part of the police power, and is wholly beyond the prerogative of the legislature."

There is nothing in the record to justify the selection of the hallock and the outlawing of all other types. Certainly judicial notice will not supply the necessary facts to support the action of the appellees.

(e). Orders Are Arbitrary, Capricious and Unreasonable.

The above discussion clearly bears out the allegation in Paragraph VIII of the amended complaint that there is no necessity for the particular orders based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and there is no showing how the hallock promotes, protects, develops or furthers the horticultural interests of the State of Ore-

gon. An order which makes illegal, types of containers which are in general use, and which give as good or better protection to the fruit from the standpoint of health, and which do not tend to deceive or defraud the public, in favor of a certain type of container which is not as well designed as those outlawed, is certainly palpably arbitrary and capricious, particularly as there is no finding of facts on which to base the selection, and where no appeal is provided for by any party who may be injured.

We do not believe this Court will sustain an order made by an administrative official designating a certain type of container which he may choose merely because it strikes his fancy. If a director of agriculture or the chief of the bureau of plant industry can designate a particular type, of particular detailed dimensions, it would be equally reasonable for such officials to require that the baskets be painted pink, or that they be manufactured from spruce over a hundred years old, or that the baskets be octagonal or round in shape, or that the baskets be only so deep that they would contain one layer of berries, or other equally capricious specifications. Under what possible basis of reasoning can it be argued that a container 4⅜x4⅜ inches outside measurements can possibly better protect public health or prevent deception or promote the public welfare than a container which may happen to have an ⅛ inch greater length or an ⅛ inch less breadth?

On the record before this Court what possible justification is there for the requirement in the orders under attack that the bottoms of the containers must be raised ¾ of an inch? What showing is there that such a false bottom

protects the public health or prevents fraud, or even furthers horticultural development of the State? If there are any reasons for such a false or raised-up bottom, such reasons must be made manifest, particularly after denial of any such justification in appellant's amended complaint. The reason cannot be supplied from outside the record, nor do we think they are within the judicial knowledge.

Congress has passed certain legislation establishing certain standards for fruit and vegetable containers. Provision with reference to standard baskets or containers for small fruits and vegetables is found in *Section 252 of Title 15, United States Code Annotated* and reads as follows:

> *"Section 252. Standard Basket or Container for Small Fruits and Vegetables.* The standard basket or other container for small fruits, berries and vegetables shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart. (a) The dry half pint shall contain 16 and 6/10ths cubic inches; (b) The dry pint shall contain 33 6/10ths cubic inches; (c) The dry quart shall contain 67 2/10ths cubic inches."

It should be noted that nothing is said as to the shape of the container, the type of the container, the particular materials of which it should be manufactured, or its specific dimensions. All that is provided is capacity. There are no other specifications. Obviously, after study, it was found that no other specifications were required.

(f) Official Containers for Berries Are Invalid Because They Differ From Standards Approved By Congress.

Section 18-2904, Oregon Code, 1930, provides as follows:

> "The board is authorized to fix and promulgate as the official standards for this state for any horticultural product or container the standard for such product or container which may have been promulgated or announced therefor under the authority of the Congress of the United States, and in carrying out the provisions of this act the board is authorized to cooperate with the United States or any department thereof in accomplishing the matters and things provided for herein."

Even though there were no other objections to the orders of appellees fixing the specifications for standard containers for berries, the orders would be void because appellees have gone beyond the authority conferred by the above section. We have pointed out that the Congress of the United States has promulgated as the official containers for berries a basket or container with only a designated capacity. The standard containers for berries fixed by the orders made by the appellees is not the standard for the container promulgated by the authority of the Congress of the United States, but differs from it in specifying the exact dimensions and a particular type of container.

Therefore, even though Section 18-2902 were not invalid on other grounds, and assuming that the legislature

could delegate to the appellees the authority to fix and promulgate standard containers, yet the appellees have gone beyond that authority and the orders should be declared void on that ground.

California is interested in its horticulture to such an extent that the Legislature adopted a voluminous agricultural code, but the only specification for strawberry and raspberry cups or baskets was that they contain a dry pint, or in the case of other berries, a half pint.

> "Strawberries * * * All strawberries shall be in the dry pint baskets containing an interior capacity of approximately 33.6 cubic inches. All other berries shall be in the dry pint baskets or in the dry half pint baskets containing an interior of approximately 16.8 cubic inches." *Sec. 793, California Agriculture Code.*

In the case of *Stegmann v. Weeks*, 279 Mo. 140, 214 S. W. 137, the Supreme Court of Missouri had under consideration an ordinance of the City of St. Louis which provided for the use of a bushel box and specified the cubic content of such box. The statute further went on and specified the exact dimensions of the particular box, but only provided a penalty for the sale of fruit in boxes or receptacles of a *capacity* different from that provided in the ordinance. The plaintiff sought to enjoin the enforcement of the statute, setting forth that he and a large number of other farmers were using boxes of a different capacity and of different dimensions than the boxes designated as standard. The Court sustained the statute insofar as the question of capacity was concerned, but went on to state that the provisions of the statute having to do

with specified dimensions, did not provide for a penalty and since plaintiff could not be injured under that part of the ordinance, denied the injunction. The Court said:

> "However, it is sufficient answer to this point to say that no penalty is fixed for the violation of that part of the ordinance describing the dimensions of the box; the plaintiffs could not be prosecuted for the misdemeanors unless they used boxes of different capacity."

The concurring opinion of Judge Faris is a clear and concise argument for the appellant in the case at bar, and for that reason we are setting out the concurring opinion in full:

> "I concur for the reason only that there is no penalty attached for the failure to use a container of the prescribed dimensions, thus leaving so much of the ordinance as prescribes the dimensions of such containers neither mandatory nor punishable, but advisory only.
>
> "I do not agree that the city of St. Louis has the authority, under the guise of a police regulation, to require the use of containers of fixed and arbitrary dimensions. I concede the authority in the city to pass an ordinance requiring such containers to be of a certain capacity so as to guard against fraud and cheating, and even to require such containers to be rectangular in shape, so as to minimize time and labor in ascertaining the conformity of such containers to the capacity required by the ordinance. But I do not think it lies in the power of the city I say by its ordinance that such containers be of required length, width, and depth. Neither do I think that one using containers of an impeccable capacity, so far as com-

plying with the requirement as to capacity is concerned, could be punished in any way for using longer or a shorter, a wider or a narrower, a deeper or shallower container than the arbitrary standard prescribed by ordinance.

"Upon the view that the ordinance means what I have said above that it ought to mean, I concur."

In the Court below, counsel for defendants argued that the orders were adopted after full hearing and consideration of the subject by parties interested. *There is nothing in the record and it is expressly denied by affidavit that appellant was ever represented or present at any of the hearings.* But even though there was a full hearing and even though all those present at the hearing, exclusive of appellant approved the order, nevertheless if the order was unreasonable, arbitrary or capricious, it would be subject to attack by plaintiff. *The reason for the Constitutional provision that a party shall not be deprived of his property without due process of law is to afford protection where a majority in a state has passed legislation, or an administrative body or officer has made orders, which violate the Constitutional right of anyone.*

(g) There is Only a Rebuttable Presumption of Constitutionality for Acts of Legislature.

In their brief in the lower court, counsel for appellees cited a number of cases to establish the point that where the Legislature has passed legislation, there is a presump-

tion of validity which can only be overcome if the facts show the statute to be clearly arbitrary or unreasonable. In the first place, every case cited by counsel for appellees dealt with an act of a Legislature. In the case at bar, there is challenged the acts of administrative officials. We have pointed out previously in this brief that there is an obvious difference between an act of a legislature and an act of an administrative official which is not based on adequate findings of facts.

Even though there be a presumption of constitutionality, such presumption may be rebutted.

In the case of *Borden's Farm Products Co. v. Baldwin*, 79 L. ed. Ad. Op. 130 at 135, this court discusses the matter as follows:

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. (Citations left out.) It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack."

It is submitted that we have shown facts which are uncontroverted that completely rebut the presumption of validity and have shown that the orders in question are palpably arbitrary, unreasonable and the capricious acts of appellees as administrative officials, not based upon

evidence or findings of facts; that there is no provision for appeal, and that the orders go much farther than the necessity of the case demands, particularly where there is no showing that the orders in question effectuate the purpose of the act on which they are presumably based.

We will now discuss briefly some of the cases cited by appellees in the court below and relied on by the lower court in its opinion. In the case of *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, this court had under consideration a municipal ordinance adopting a standard weight loaf of bread. The ordinance did not go further than to set the standard of weight. There was substantial testimony introduced at the hearing in that case and it was clearly shown that the ordinance was passed to protect the public from fraud in a common article in everyday use. If the Chicago ordinance had undertaken to prescribe the exact dimensions of loaves of bread, and had fixed that size in such a way as to give certain bakers a virtual monopoly, shutting out competition by others unless they installed expensive machinery, no member of the court would have sustained the ordinance. The case is clearly distinguishable from the case at bar upon the facts. There have been a number of other cases in which standards affecting weight or capacity alone have been sustained and we have no quarrel with these cases nor the principles of law laid down therein. They are readily distinguishable from the case at bar which is unique in that the orders not only specify one peculiar type of container, but they specify the exact outside measurements, rather than the capacity. Incidentally, all of these cases were appeals

from legislative enactments with the exception of the case dealing with the municipal ordinance involved in the Schmidinger case.

The recent case of *Nebbia v. People of the State of New York,* 291 U. S. 502, 78 L. ed. 940, will probably be cited by counsel for appellees. In the prevailing and dissenting opinions in that case, there is an extensive review of the decisions of this Court dealing with the police power and the Fourteenth Amendment. As we understand the case, no new rule of law is set forth. The case sustained the power of the State of New York in the matter of fixing prices in the milk business. As was said by the Court in the prevailing opinion:

> "The function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." (Page 536.)

In the Nebbia case, the record is very full, showing facts surrounding the industry which the New York legislature deemed sufficient to justify the legislation. Considerable emphasis is placed upon the emergency conditions in the industry. The majority of the Court were of the opinion that under the particular facts introduced, the legislation should be sustained.

In the case at bar, all such evidence is lacking. There is no showing that either in the horticultural industry or the berry industry that it was necessary that standard con-

tainers be established, or that the effect of the establishment of the particular or any standard containers did protect, further or promote horticultural interests of the State of Oregon.

It is submitted that the orders so far as they relate to strawberry and raspberry containers should be held void as depriving appellant of its property without due process of law, and not within the legitimate use of the police power.

II. THE ORDERS IN QUESTION ARE VOID BECAUSE THEY INTERFERE WITH AND IMPOSE UNLAWFUL BURDENS ON THE INTERSTATE COMMERCE OF APPELLANT.

The amended bill of complaint points out that plaintiff is engaged in the business of manufacturing the berry boxes in question in the State of California and sells them to dealers in the State of Oregon and also sells them to dealers in the State of California who have in the past filled such boxes and shipped the boxes of berries from California to the State of Oregon. See Paragraph VII of the amended complaint (R. 5). As the bill of complaint further alleges, the effect of the orders in question, coupled with the legislation making it unlawful to sell or ship berries in the State of Oregon, irrespective of the origin of the berries, in other than the standard containers, is to prevent the use of the containers manufactured by

plaintiff, in the State of Oregon and the shipment of California berries packed in such containers into the State of Oregon.

In the opinion of the Court below and in the brief of counsel in the Court below, the statement was made that the statutes involved in this case are limited so as not to apply to berries brought from outside the state and offered for sale, consigned for sale or sold in the original package in the state. While it is true that *Section 18-2911, Oregon Code, 1930,* makes this limitation, *Section 3 of Chapter 225, Oregon Laws of 1933,* makes no such exception. That section reads as follows:

> "It shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the state of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the State of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed, and each container or package stamped, marked or labeled in conformity with such grades and regulations, except that such transportation be from the fields where grown to the packing house, canneries or by-products plants. It also shall be unlawful to prepare, deliver for shipment, ship, transport, offer for sale or sell a deceptive pack, or package, load, arrangement or display of fruits, vegetables and/or other horticultural products."

The orders involved in this case are void because they place a direct burden upon interstate commerce. The effect of the orders may be stated as follows: "Producers

and dealers of berries grown in the State of California, if you desire to sell these berries in Oregon you must purchase hallocks which cannot be made in California, but which can only be made in Oregon. Otherwise, you cannot sell your berries in Oregon." It cannot be said in support of the orders that berries packed in other than hallocks are bad for the health or have a tendency to defraud the public. The recent case of *Baldwin vs. Seelig*, 79 L. ed. Ad. Op. 525 at 529 is directly in point.

The Court below in its opinion, in discussing the matter of interstate commerce, relied on the fact that when the original package was broken up for use, it ceased to be a part of foreign commerce and became subject to the laws of the State, and its was argued that the interstate commerce clause would not apply. In other words the Court below used what is known as the test of the original package.

This Court in the recent case of *Baldwin vs. Seelig*, supra, stated:

> "In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. Pennsylvania Gas Co. vs. Public Service Commission, 225 N. Y. 397, 403, 122 N. E. 260, P. U. R. 1919C, 663. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this over-mastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim

and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the nobility of commerce. They set up what is equivalent to a rampart of customs duty designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in results. The form of the packages, in such circumstances, is immaterial, whether they are original or broken. The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading unescapedly to the suppression so intended.

"The statute here in controversy will not survive that test. A dealer in milk buys it in Vermont at prices there prevailing. He brings it to New York, and is told he may not sell it if he removes it from the can and pours it into bottles. He may not do this for the reason that milk in Vermont is cheaper than milk in New York at the regimented prices, and New York is moved by the desire to protect her inhabitants from the cut prices, and other consequences of Vermont competition. To overcome that competition, a common incident of ownership—the privilege of sale in convenient receptacles—is denied to one who has bought in interstate commerce. He may not sell on any terms to any one, whether the orders were given in advance or came to him thereafter. The decisions of this court as to the significance of the original package in interstate commerce transactions were not meant to be a cover for retortion or suppression." (Pages 530-531.)

The decision above quoted is particularly apt in the case at bar. Here in this case the amended complaint and affidavits show (R. 6) that the type of box adopted by the Director of Agriculture can only be made in the

Northwest. The officials of the State of Oregon, to prevent competition with berry boxes made outside the State of Oregon have adopted regulations, the effect of which is to prohibit the shipment into Oregon of berry boxes made in California. Here we have a direct burden on interstate commerce, the effect of which is to eliminate competition from sources outside of the Northwest, in the berry box field. There is nothing in the record to show that the hallock has any advantages over the tin-top berry box so far as prevention of fraud, protection of public health or the public morals, or the public convenience, is concerned.

But there is another reason why the orders and *Section 3 of Chapter 225 of Oregon Laws of 1933* cannot be upheld. Congress has defined a standard container for baskets for small fruits and vegetables in *Section 252 of Title 15, United States Code Annotated*, which provided as follows:

> "The standard basket or other container for small fruits, berries and vegetables shall be of the following capacity, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart. (The dry half pint shall contain 16.6 cubic inches; the dry pint shall contain 33.6 cubic inches; (c) the dry quart shall contain 67.2 cubic inches.)"

That section merely limits the capacity of containers for berries. But the orders which have been challenged in this case not only specify the cubic contents, but limit the type of basket that is allowed and provide that it must have a raised-up bottom and specify the exact length,

breadth and width. Such orders are clearly inconsistent and go far beyond the legislation provided by Congress.

> "* * * the state could not regulate the business by a statute which had the effect to control and burden interstate commerce."
>
> Lemke v. Farmers' Grain Co., 258 U. S. 50, 55; 66 L. ed. 458, 462; 42 Sup. Ct. Rep. 244.
>
> "When Congress exerts its authority in a matter within its control, State laws must give way, in view of the regulation of the subject matter by the superior power conferred by the Constitution."
>
> U. S. v. Hill, 248 U. S. 420 at 427; 63 L. ed. 337 at 341, 39 Sup. Ct. Rep. 143.

A case cited with evident confidence by the appellees in the court below holds as follows:

> "The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce."
>
> Savage v. Jones, 225 U. S. 501, 524, 525; 56 L. ed. 1152, 1191.

It is submitted therefore that the orders under attack and Section 3 of Chapter 225 of General Laws of 1933, should be declared void as interfering with and imposing unlawful burdens on interstate commerce, and particularly the business of plaintiff, contrary to and in violation of the provisions of sub-division 3 of Section 8 of Article I of the Constitution of the United States.

III. THE STATUTE, UNDER THE AUTHORITY OF WHICH THE CHALLENGED ORDERS WERE MADE, CONSTITUTE AN UNLAWFUL DELEGATION OF AUTHORITY TO ADMINISTRATIVE OFFICIALS.

Article III of the Constitution of Oregon provides as follows: "The powers of the government shall be divided into three separate departments—the legislative, the executive including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

Article IV, Section 1 of the Constitution of the State of Oregon provides: "The legislative authority of the State shall be vested in a legislative assembly * * *"

The section of the law relied upon by the appellees to support the orders is *Section 18-2902, Oregon Code, 1930*, which provides as follows:

> "In order to promote, protect, further and develop the horticultural interests of this state, the Board *is hereby authorized and empowered*, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to change any of them from time to time." (Italics ours.)

The above Act delegated to the Oregon State Board of Horticulture the authority to fix and promulgate official

standards for containers. However, under the provisions of *Chapter 136 Oregon Laws 1931* (see appendix), all of the functions of the Oregon State Board of Horticulture were taken over by the State Department of Agriculture under the direction of a single official known as the Director of Agriculture, and one of the appellees in this case, the other appellee being merely a chief of one of the divisions of the Department of Agriculture.

Section 18-2902 Oregon Code 1930 does not *direct* the Board of Horticulture to fix and promulgate standards for grading and classifying horticultural products and to fix official standards for containers. It merely authorizes the Board to take such action in the discretion of the Board. The matter of whether any action shall be taken rests wholly in the uncontrolled discretion of some one other than the legislature, originally the Board of Horticulture, now the Director of Agriculture. The legislature did not make a law requiring the Board to fix standards after investigation and public hearing. It merely delegated the right to make such a law to the Board. A discretion was given the Board not only as to whether or not there should be any law fixing and promulgating official standards, but complete authority was given as to what the law should be. This statute did not merely give authority or discretion as to the execution of a law which the legislature had made to be exercised under and pursuant to such a law, but actually delegated to the Board the matter of whether or not there should be any official containers at all.

On the principle that a legislature cannot delegate the

authority or power to make a law, as distinguished from the power to administer it, the statute in question should be declared invalid.

In the case of *Van Winkle v. Fred Meyer, Inc., decided on October 2, 1935, by the Oregon Supreme Court,* and heretofore referred to in this brief, the Court dealt with the problem of delegation of authority by the legislature, under the Oregon Constitution and said:

> "Under our constitution, Article IV, section 1, the power to make and declare laws, subject only to the initiative and referendum powers reserved to the people, is vested exclusively in the legislative assembly and, by Article III, section 1, the powers of government are divided into three departments, namely: the legislative, the executive, including the administrative, and the judicial, and each of said departments is prohibited from exercising any of the powers conferred upon either of the others. Under these provisions the legislature cannot confer upon any person, officer, agency or tribunal the power to determine what the law shall be. * * *
>
> "Under the very terms of the act in question, there is to be no law fixing the price of any commodity or regulating its production or sale unless a preponderant majority engaged in its production or sale formulate an agreement and secure its approval by the governor. Under the specific directions of the act, when this has been done, the prices so fixed and the regulations so adopted are to become the law of the state, but if no agreement is entered into, then there is to be no law. This leaves wholly to persons outside the legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be. It is impossible to conceive of a more complete delegation of legislative

power and, since the act contravenes the plain provisions of our constitution in that it attempts to make an unlawful and unauthorized delegation of legislative power, the act is unconstitutional and void. The same conclusion was reached by the supreme court of Wisconsin in the case of Gibson Auto Co. v. Finnegan (250 N. W. 420), in respect to an act very similar in its terms to the one involved here. (Quotations from Finnegan case omitted.)

"The legislature of the State of Washington enacted a similar law to the one involved here, known as the Washington Agricultural Adjustment Act. The purposes of its enactment were the same as those in question here, and it contained many identical provisions with those found in the act involved here. In passing upon its validity, because of the same objections now urged here, the supreme court of that state held the act to be unconstitutional in Uhden v. Greenough, 81 Wash. Dec. 361, 43 P. (2d) 983, and Griffiths v. Robinson, 81 Wash. Dec. 384, 43 P. (2d) 977. The act was thereafter amended, seeking to avoid the constitutional objections that had been urged and sustained against its validity in the two cases cited. As so amended, the act was again held to be unconstitutional as an unauthorized and unlawful delegation of legislative power in State v. Matson Company, 82 Wash. Dec. 430.

"The constitutional principle which denies to the legislature the authority to delegate the power of making laws and authorized it to delegate purely administrative functions was stated by the supreme court of Ohio in Cincinnati, Wilmington, etc. R. Co. v. Clinton County Commissioners, 1 Ohio St. 77, 88, in these words:

'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be,

> and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'
>
> "That language was quoted with approval by the supreme court of the United States in Field v. Clark, 143 U. S. 649, and again in the recent case of Panama Refining Co. v. Ryan, 293 U. S. 388."

Substantially similar provisions of the Federal Constitution were construed by this Court in passing upon the constitutionality of the National Industrial Recovery Act.

The cases are so recent that we deem it unnecessary to quote extensively from them.

> Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. Ad. Op. 223; 55 Sup. Ct. 241.
>
> Schechter v. United States, 79 L. Ed. Ad. Op. 888; 55 Sup. Ct. 837.

The United States Circuit Court of Appeals for the First Circuit held the Federal Agricultural Adjustment Act unconstitutional on the ground that it provided for an improper delegation of legislative authority, in the case of *Butler v. United States*, 78 Fed. Rep. (2d) 1.

> "What the Supreme Court said of section 9 (c) of the National Recovery Act (15 USCA 709 (c) in the Panama Refining Co. case may likewise be said of section 2 of the Agricultural Adjustment Act, 7 USCA 702, and section 8, as amended, 7 USCA 608). Neither section 2 nor section 8 of this act states whether or under what circumstances the Secretary

shall enter into agreements to limit production of basic agricultural commodities. Action by the Secretary is not mandatory, and the Act establishes no criterion to govern his course of action. It requires no finding by him as a condition of his action, nor is any provision for judicial review provided in the Act in case of a finding that such standard in fact exists. It is true that the facts in this case are different from those in the Panama Refining Co. case and in the Schechter poultry case, but the provisions defining the acts of the Secretary differ from those authorizing the acts of the President in those cases only in the general terms employed. The principle involved is the same."

Butler v. United States, 78 Fed. (2nd) 1.

Not only does *Section 18-2902 Oregon Code 1930* leave it optional with the Board (now the Director of Agriculture) to promulgate standards for containers, but this section fails to provide any standards to govern the discretion of the administrative officials, in setting such standards. An examination of the statute in question shows that it merely contains the following language:

"* * * In order to promote, protect, further and develop the horticultural interests of this State. * * *"

This language certainly cannot be considered as providing any legal standards. This court dealt with this subject in construing the National Industrial Recovery Act.

Panama Refining Co. v. Ryan, supra.

Schechter v. United States, supra.

See also Butler v. United States, supra.

In passing on the Oregon Agricultural Adjustment Act, the Oregon Supreme Court in the case of *Van Win-*

kle v. Meyer, supra, construed language very similar to that set forth in the statute involved in this case, as follows:

> "The further objection that this act is unconstitutional because it contains no standard or guide and prescribed no rule of law by which the powers conferred under the act are to be exercised must also be sustained. It is a fundamental principle of constitutional law that in delegating powers to an administrative body, the legislature must prescribe some rule of law or fix some standard or guide by which the actions of that body, in administering the law, are to be governed and made to conform. Under this act, there is no rule of law, nor is there any standard or guide prescribed by which the persons to whom the powers are to be delegated are to be controlled or to which they must conform."

To the same effect are the recent decisions of the Washington Supreme Court construing the Washington Agricultural Adjustment Act.

> Uhden v. Greenough, 81 Wash. Dec. 361, 43 P. (2d) 983.
>
> Griffiths v. Robinson, 81 Wash. Dec. 384, 43 P. (2d) 977.
>
> State v. Matson Company, 82 Wash. Dec. 430.

There is a further ground why *Section 18-2902 Oregon Code 1930* should be held to be an unconstitutional delegation of authority to appellees. The statute, although providing for investigation and public hearing, makes no provision for findings of fact, the giving of any particular notice, nor does it provide that the board, even after hearing, shall be bound by the evidence brought out at such hearing. Furthermore, no provision is made for appeal

from the order of the administrative official fixing and promulgating official standards for containers.

> "And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual."
>
> Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. ed. Ad. Op. 223 at 238, 65 Sup. Ct. 241.

To the same effect, see *Butler v. United States*, 78 *Fed. (2d) 1*, particularly at page 10.

It cannot be argued that the Director of Agriculture will act only in the public good in promulgating the standards. As was said in the case of *Panama Refining Co. v. Ryan, supra*:

> "The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute."

It is submitted that Section 18-2902 Oregon Code of 1930, and the challenged orders based on this section should be declared void on the ground of unconstitutional delegation of legislative authority.

The question of improper delegation of legislative authority arises under the Constitution of the State of Oregon. While this point alone does not involve a Federal question, since the United States District Court and this court have acquired jurisdiction by reason of Federal questions involved, this court has the right to decide all questions in the case.

"If the bill presented a substantial controversy under the Constitution of the United States, and the requisite amount was involved, the jurisdiction extended to the determination of all questions, including questions of state law, and irrespective of the disposition made of the Federal question."

Lincoln Gas & Electric Co. v. Lincoln, 250 U. S. 256, 264, 63 L. ed. 968, 39 S. Ct. Rep. 454.

Siler v. Louisville Nashville Railway Co., 213 U. S. 175, 191, 53 L. ed. 753, 757, 29 S. Ct. Rep. 451.

Hurn v. Oursler, 289 U. S. 238, 243, 244, 77 L. ed. 1148, 1152, 1153, 53 S. Ct. Rep. 586.

Glenn v. Field Packing Co., 290 U. S. 177, 78 L. ed. 252, 54 S. Ct. Rep. 138.

CONCLUSION

This suit was originally instituted and this appeal taken because appellant, a manufacturer of fruit and vegetable baskets, other containers, and berry cups, believed that the Department of Agriculture of the State of Oregon had fixed and promulgated palpably unreasonable, arbitrary and capricious standards, particularly for berry baskets or cups. Appellant was not and is not willing to concede that standards and specifications may be fixed for containers at the whim of an administrative official, or even by a legislature, merely so that all such containers shall be exactly alike. Enforced standardization is not designed to further and develop horticulture as much as it is designed to create a monopoly for the benefit of the manufacturers of the favored type of container.

Appellant believes that the orders in question insofar as they relate to strawberry and raspberry containers and the supporting statutes should be declared unconstitutional and void.

I. They deprive appellant of its property without due process of law and are not a legitimate use of the police power.

(a) The orders in question were promulgated not by the legislature but by administrative officials and the orders do not contain any findings of fact based on adequate evidence justifying the particular specifications, or the necessity for any specifications.

(b) A careful study of the cases dealing with the legitimate bounds of the police power shows that while it is not susceptible of definition with precision, it must be exercised within a limited ambit and the final determination rests upon a study of the particular facts in each case. If, after such study of the facts, this court comes to the conclusion that the law or orders complained of are unreasonable, arbitrary and capricious in reference to the particular subject matter, or if the means employed have no real, substantial relation to a public object which government can accomplish, or if the orders are beyond the necessities of the case, then this court will decree the challenged law or orders as being in conflict with constitutional inhibition. This case arose on a motion to dismiss the amended bill of complaint for insufficiency of facts, and on a denial of appellant's petition for an interlocutory injunction. The only facts therefore before the court are the uncontroverted allegations of the amended bill of complaint,

and the affidavits in support of the interlocutory injunction. We have discussed the facts as alleged quite fully and we believe that these facts show that the specifications involved are clearly unreasonable, arbitrary and capricious and that the orders are not necessary for the furtherance of the horticulture of the state. The facts alleged in the amended bill of complaint fully rebut any presumption of validity, even if the orders were acts of the legislature and not merely the fiat of administrative officials, unsupported by findings of fact. There is not even a provision for appeal by a party who may be aggrieved by the administrative orders. The only effect of the enforced standardization is to grant a monopoly to manufacturers of the favored type of container. The orders are in conflict with the standards provided by Congress and therefore contrary to *Section 18-2904,* which only authorizes standards in accord with those fixed by the Congress of the United States. It is therefore submitted that the orders insofar as they relate to strawberry and raspberry containers be declared void as depriving appellant of its property without due process of law.

II. The orders and statutes involved clearly burden interstate commerce as berries shipped from outside the State of Oregon cannot be sold or transported within the State of Oregon unless in the standard containers. Tin-top baskets made by appellant in the State of California cannot be shipped and sold in the State of Oregon. Congress has defined a standard container for small fruits and vegetables by merely specifying the capacity, and the detailed specifications of the orders complained of are in conflict

with the supreme Federal law. Therefore, the orders under attack, and *Section 3 of Chapter 225 General Laws of Oregon*, should be declared void as interfering with and imposing unlawful burdens on interstate commerce.

III. The statutes, under the authority of which the challenged orders were made, constitute an unlawful delegation of authority to administrative officials.

(a) It is left to the discretion of the administrative officials as to whether there shall be any law or order providing for standard containers and as to what such law shall be. (b) The statute provides no standard or policy to guide the administrative officials. (c) There is no provision for findings of fact to be made part of the administrative order. Too much is left to the uncontrolled discretion of the administrative official.

We believe that there has been presented a sufficiently strong case for a final determination by this court, declaring the challenged orders and supporting statutes unconstitutional. We therefore urge that the decree of the lower court be reversed with directions to enter a permanent injunction as prayed for by appellant.

Respectfully submitted,

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Solicitors for Appellant.

APPENDIX "A"

Section 18-2902, Oregon Code of 1930:

"In order to promote, protect, further and develop the horticultural interests of this state, the board is hereby authorized and empowered, after investigation and public hearing, to fix and promulgate official standards for grading and classifying any or all horticultural products grown or produced in this state and to fix and promulgate official standards for containers of horticultural products and to change any of them from time to time."

(The Board referred to in said Section was the Oregon State Board of Horticulture.)

Section 18-2904, Oregon Code of 1930:

"The board is authorized to fix and promulgate as the official standard for this state for any horticultural product or container the standard for such product or container which may have been promulgated or announced therefor under the authority of the congress of the United States, and in carrying out the provisions of this act the board is authorized to cooperate with the United States or any department thereof in accomplishing the matters and things provided for herein."

Section 18-2911, Oregon Code of 1930:

"• • • Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a container, any such horticultural product to which the standard is applicable,

unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act. * * * Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100) or be imprisoned not more than one year or both."

Chapter 136 Oregon Laws 1931:

"Section 1. There hereby is created a department of the government of the state of Oregon to be known as the state department of agriculture, hereinafter called the department. The department shall be conducted under the control of an executive officer to be known as the director of agriculture, hereinafter called the director, who shall be appointed by the governor, and shall serve during his pleasure.

"Section 2. For purposes of administration the director shall organize the work of the department under five divisions: (1) Administration, (2) plant industry, (3) animal industry, (4) foods and dairies, (5) markets, grades and standards.

"Section 3. Over each division there shall be an officer to be designated the chief of his division. The director shall be ex officio chief of the division of administration. The chiefs of the other divisions shall be appointed by the director with the consent of the governor and shall hold office at the pleasure of the director.

* * * *

"Section 5. On and after July 1, 1931, the department

of agriculture shall succeed to and hereby is invested with all the powers and duties of the state board of horticulture, * * *."

Chapter 225, Oregon Laws 1933:

"* * * Section 3. It shall be unlawful for any person, firm, association or corporation to sell, offer for sale or transportation, or to transport within the State of Oregon any fruits, vegetables and/or other horticultural products for which the department of agriculture of the state of Oregon has established grades and regulations, unless such fruits, vegetables and/or other horticultural products have been graded and packed, and each container or package stamped, marked or labeled in conformity with such grades and regulations, except that such transportation be from the fields where grown to the packing house, canneries or by-product plants. It also shall be unlawful to prepare, deliver for shipment, ship, transport, offer for sale or sell a deceptive pack, or package, load, arrangement or display of fruits, vegetables and or other horticultural products.

"Section 8. Any person, firm or corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than the sum of $20 nor more than $500 or by imprisonment in the county jail for a period not to exceed 60 days, or by both such fine and imprisonment."

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 48

PACIFIC STATES BOX & BASKET COMPANY,
A CALIFORNIA CORPORATION,
Appellant,

vs.

S. T. WHITE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

APPELLANT'S REPLY BRIEF

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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No. 48

PACIFIC STATES BOX & BASKET COMPANY,
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vs.

S. T. WHITE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

REPLY BRIEF

Appellant desires to comment briefly on certain points raised in Appellees' brief.

Point I.

Appellees contend that appellant is not in a position to maintain this suit because its interest is indirect.

In addition to the cases cited in the principal brief, appellant desires to call to the attention of the court the case

of *Station WBT* vs. *Poulnot*, 46 F. (2d) 671. The holding of that case is that a broadcasting company, not doing business in the State of South Carolina, had a sufficient interest in radio listeners to maintain a suit enjoining the collection of the South Carolina tax on radio receivers on the ground that the tax was unconstitutional.

No appeal was taken from this decision.

This case, together with those cited in appellant's reply brief to appellees' Statement Opposing Jurisdiction, to which reference is made, and the cases cited in the main brief clearly sustain appellant's right to attack the validity of the orders and statutes involved.

The question of whether appellant is licensed to do business in the State of Oregon is not properly before the court as the issue has not been raised by any pleading of defendant.

A foreign corporation is presumed to have complied with the conditions precedent, contained in the State Statutes before engaging in business therein and the complaint need not allege its compliance. 18 Fletcher Cyc. of Corporation (2d) 35 and cases cited. 18 Fletcher (2d) 79 and cases cited.

Point IV.

Appellees have cited *Detweiler* vs. *Welch*, 46 F. (2d) 75 and *Marshall* vs. *Department of Agriculture*, 44 Id. 440, 258 Pac. 171, in support of their contention that the orders in question constitute a reasonable exercise of the police power. In the former case the court said that regulation of the marketing of farm products was recognized as a legitimate exercise of the police power—provided such regulation is not in conflict with an Act of Congress. The case of *Van Winkle* vs. *Meyer*, 21 Ore. Ad. Sh. 85, is directly contra on the issue of the right to regulate marketing of farm products, and, furthermore, in the case at bar the

orders in question do conflict with an Act of Congress as we have pointed out in our principal brief.

In the *Marshall case*, the case was reversed on the issue of the reasonableness of the standards, which is the point involved in the case at bar.

Appellees argue at page 14 of their brief that *Sec. 18-2902 Oregon Code 1930*, is a legislative finding that it is necessary and proper that standards be promulgated. That is not true. The express language of the statute provides that the Board is *authorized* to promulgate standards, if after investigation the Board believes it necessary. To be a legislative finding the statute, at least would have to *direct* that standards be promulgated, not merely *authorize* and empower the fixing of standards.

Point V.

This point of appellees deals with the conflict between the State Statutes and orders, and the Federal Statute covering berry containers. In addition to the cases cited in our main brief, and the cases cited by appellees, we desire to cite: *Napier* vs. *Atlantic Coast Line Railway Co.*, 272 U. S. 605, 71 L. Ed. 432.

In the Napier Case this Court had under consideration the matter of whether State Statutes requiring certain equipment on locomotives could be sustained. The court held that that although the State Statutes were within the police power and designed to protect and promote the health of railroad employees, nevertheless it could not be sustained because the Interstate Commerce Commission has authority to specify equipment of locomotives. This decision was reached even though no equipment of a similar type was specified by the Interstate Commerce Commission or by Congress. This case apparently goes much farther than the conflict between congressional legislation and State regulation of berry boxes in the case at bar. In this question of conflict, we are not relying upon a general con-

gressional statute regulating fruit containers but the congressional statute involved actually regulates containers for berries and is in conflict with the State statute.

This Court said in the case of *Missouri Pacific Company* vs. *Porter*, 273 U. S. 341, 364, 71 L. Ed. 672-675, 47 S. Ct. 383:

> "Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other legislation is necessary. Its power to regulate such commerce and all its instrumentalities is supreme; and if that power has been exerted state laws have no application. They cannot be applied in coincidence with, as complementary to or as in opposition to Federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

The case of *Gilvary* vs. *Cuyahoga Valley Railway Company*, 292 U. S. 57, 78 L. Ed. 1123, cited by appellees is readily distinguishable from the cases we have cited. In the *Gilvary case* the claim was for an injury to an employee of the railroad company when the party had contracted to be bound by the Ohio Elective Workman's Compensation Law, and the holding of the court is that the right of the employee to recover, since his duties were wholly intrastate his right to collect damages from the carrier does not spring from the Federal Acts but from the law of the State.

The *Gilvary case* expressly recognizes that as far as safety equipment is concerned the Federal Acts operate to exclude State regulation, whether consistent, complemenary, additional or otherwise.

Point IX.

It is submitted that the matter of unlawful delegation of legislative power may be properly raised by appellant on this appeal under the following assignments of error:

Assignment No. 1.—This assignment is to the effect that the court erred in refusing to enjoin the defendants from enforcing the orders under attack. Obviously if the legislature could not legally delegate the authority to the appellees the appellees could not lawfully make the orders complained of and they should have been enjoined.

The same argument applies to specification No. 2 which is based on the failure of the court to enjoin the enforcement of the particular statutes involved so far as they attempt to sustain the orders specified for containers for berries.

Specification No. 6 is that the court erred in refusing to hold that the orders and statutory provisions were violative of the constitutional rights of the plaintiff. Under this specification of error we believe that the matter of delegation of authority could be properly raised as unlawful delegation is prohibited by the Constitution.

The same point we believe could be validly raised with reference to specifications 7, 8, and 9.

While Rule 27, paragraph 4, provides that errors not specified will be disregarded, it further provides that the court at its option, may notice a plain error not assigned or specified. If the court concludes that the matter of delegation of authority does not properly come within the errors specified it is submitted that it is a *plain* error of a serious and controlling character, as it goes directly to the power of the appellees, and we believe should be noticed by this Court.

Respectfully submitted,

ARTHUR A. GOLDSMITH,
BYRON C. HANNA,
Counsel for Appellant.

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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. ~~955~~ 48

PACIFIC STATES BOX AND BASKET COMPANY, A CALIFORNIA CORPORATION,

Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, AND CHAS. A. COLE, AS CHIEF OF THE DIVISION OF PLANT INDUSTRY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF OREGON,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

APPELLEES' STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT ON APPEAL.

I. H. VAN WINKLE,
Attorney-General of Oregon,
WILLIS S. MOORE,
Assistant Attorney-General of Oregon,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 955

PACIFIC STATES BOX AND BASKET COMPANY, A CALIFORNIA CORPORATION,

Appellant,

vs.

MAX GEHLHAR, AS DIRECTOR OF AGRICULTURE FOR THE STATE OF OREGON, AND CHAS. A. COLE, AS CHIEF OF THE DIVISION OF PLANT INDUSTRY OF THE DEPARTMENT OF AGRICULTURE FOR THE STATE OF OREGON,

Appellees.

APPELLEES' STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT ON APPEAL.

This appeal involves a question of whether or not certain statutes of the State of Oregon authorizing the adoption of standard containers for horticultural products, and an order of the Department of Agriculture of said state, promulgated pursuant to said statutes and fixing standards for pint containers of raspberries and strawberries, unlawfully deprive appellant of its property without due process of law, deny to it the equal protection of the laws, and impose unlawful burdens upon the interstate commerce and

business of appellant, contrary to and in violation of Section 1 of the 14th Amendment of the Constitution of the United States, and subdivision 3, section 8, Article I of the Constitution of the United States, by preventing appellant from obtaining orders from dealers in Oregon for containers manufactured by it in California (Par. XI of Amended Complaint), which do not conform to said Oregon standards.

In Appellant's Statement as to Jurisdiction on Appeal, pages 2-3, it is stated that the order fixing standards was made under the purported authority of section 18-2902 and section 18-2911, Oregon Code 1930, and sections 3 and 8, chapter 225, Oregon Laws 1933.

Appellees submit that chapter 225, Oregon Laws 1933, has no direct application for the reason that while it relates to the labeling, packing, possession for sale or transportation, and to the sale of fruits, vegetables and/or other horticultural products, and to their containers, it fixes no standards involved in the question presented by this appeal.

On May 3, 1933, the Director of Agriculture of the State of Oregon, who is the successor of the Oregon State Board of Horticulture (chapter 136, Oregon Laws 1931), acting pursuant to section 18-2902, Oregon Code 1930, promulgated an order fixing Oregon standards for pint containers of raspberries and strawberries. Said standards and the statute providing for same are set out at pages 3-5 of "Appellant's Statement as to Jurisdiction on Appeal", and copies of same are attached to appellant's amended complaint.

Section 18-2911, Oregon Code 1930, provides, among other things as follows:

> "• • • Whenever any standard for a container for any horticultural product becomes effective under this act, no person thereafter shall pack for sale, offer for sale, consign for sale, or sell and deliver, in a

container, any such horticultural product to which the standard is applicable, unless the container conforms to the standard, subject to such variations therefrom as may be allowed in the regulations made under this act, unless such product be brought from outside the state and offered for sale, consigned for sale or sold in the original package. Any person violating this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than one hundred dollars ($100), or be imprisoned not more than one year or both."

Appellees contend that this appeal does not present a case involving a substantial Federal question, for the reason that appellant, a foreign corporation, not licensed to do business in the State of Oregon, has no constitutional right to compel the State of Oregon to desist from prohibiting its citizens from using containers which do not conform to standards adopted by the State as a matter of public policy.

The Bank of Augusta v. *Earle*, 13 Pet. 519, 590, 594, 10 L. Ed. 274, 309, 310.

Pembina Consolidated Silver Mine Co., etc. v. *Pennsylvania*, 125 U. S. 181, 184, 185, 189, 31 L. Ed. 650, 652, 653.

Hooper v. *State of California*, 155 U. S. 648, 652, 39 L. Ed. 297, 299.

Waters-Pierce Oil Co. v. *Texas*, 177 U. S. 28, 43, 44 L. Ed. 657, 663.

Munday v. *Wisconsin Trust Co.*, 252 U. S. 499, 503, 64 L. Ed. 684, 689.

The use in the State of Oregon of pint strawberry and raspberry containers manufactured and sold by appellant is contrary to the declared public policy of that state.

Section 18-2902, Oregon Code 1930.

Section 18-2903, Oregon Code 1930.

The effect upon interstate commerce of the enforcement of the statutes and order complained of by appellant is too indirect to present a substantial Federal question.

Louisville & N. R. Co. v. *Kentucky*, 183 U. S. 503, 518, 519, 46 L. Ed. 298, 306.

Savage v. *Jones*, 225 U. S. 501, 520, 524, 539, 56 L. Ed. 1182, 1184, 1189, 1191, 1197.

Browning v. *Waycross*, 233 U. S. 16, 22, 58 L. Ed. 828, 832.

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I. H. Van Winkle,
Attorney-General;
Willis S. Moore,
Assistant Attorney-General,
Counsel for Appellees.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 48

PACIFIC STATES BOX AND BASKET COMPANY,
Appellant,

v.

MAX GEHLHAR, as Director of Agriculture for the State of Oregon, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Oregon.

APPELLEES' BRIEF

I. H. VAN WINKLE,
Attorney-General of Oregon,

WILLIS S. MOORE,
Assistant Attorney-General of Oregon,
Counsel for Appellees.

ARTHUR A. GOLDSMITH and
BYRON C. HANNAH,
Counsel for Appellant.

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IN THE

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No. 48

PACIFIC STATES BOX AND BASKET COMPANY,
Appellant,

v.

MAX GEHLHAR, as Director of Agriculture for the State of Oregon, et al.,
Appellees.

Appeal from the District Court of the United States for the District of Oregon.

APPELLEES' BRIEF

STATEMENT

Appellees do not deem it necessary to make a statement of facts additional to that in appellant's brief.

ARGUMENT

Summary

Appellees' argument in this case may be summarized as follows:

1. The right of appellant, a California corporation, not licensed to do business in the state of Oregon, to

sell its products for use in that state is not property within the meaning of that term as used in the due process of law and equal protection of the laws clauses of the 14th Amendment to the Federal constitution.

2. It is not a Federal agency, and the statutes and orders of which it complains do not directly prevent it from selling its products to residents of Oregon and shipping them into that state in interstate commerce. The state regulations of which it complains apply only to the use of such products after they have arrived in the state and original packages have been broken. Consequently, they do not directly affect interstate commerce of appellant, and its objections to same do not present a substantial Federal question.

3. The statutes and orders involved apply equally to every person and corporation affected thereby. They were not intended to and do not create a monopoly in favor of Oregon manufacturers and against appellant.

4. The statutes and orders are reasonable and necessary for the promotion of the public welfare of the state, and they therefore constitute a reasonable exercise of the police power.

5. The terms of the orders regulating dimensions of containers do not conflict with Federal regulations.

6. The burden is upon appellant to show that the statutes and orders exceed the constitutional power of the state in the particulars in which they apply it.

7. The record does not rebut the presumption that constitutional powers have not been exceeded.

8. The statutes involved do not require that the orders of the Department of Agriculture be supported by findings.

9. The contention that the statutes involved constitute an unlawful delegation of legislative authority to administrative officers is not open to consideration by this court, for the reason that it was not raised in the court below nor assigned as error in this court.

10. There has been no unlawful delegation of legislative power in connection with the issuance of the orders complained of in this case.

POINT I

Appellant has no property right to sell its products in Oregon in violation of the public policy of that state.

The Bank of Augusta v. Earle, 13 Pet. 519, 590, 594, 10 L. Ed. 274, 309, 310.

Pembina Consolidated Silver Min. Co. v. Pennsylvania, 125 U. S. 181, 184, 185, 189, 31 L. Ed. 650, 652, 653.

Hooper v. State of California, 155 U. S. 648, 652, 39 L. Ed. 297, 299.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. Ed. 657, 663.

Munday v. Wisconsin Trust Co., 252 U. S. 499, 503, 64 L. Ed. 684, 689.

Nebbia v. New York, 291 U. S. 502, 525, 537, 539, 78 L. Ed. 940, 950, 957, 958.

Appellant's contentions in the lower court were (R. 7):

(1) That the statutes and order complained of deprive appellant of property without due process of law; (2) deny to appellant the equal protection of the laws, and grant a monopoly to Oregon manufacturers of the type of containers specified in said orders; and (3) that they interfere with and impose unlawful burdens on the interstate commerce and business of appellant.

The penalties involved (see Appendix to Appellant's Brief) do not in any particular apply to appellant. Their indirect or incidental effect upon appellant is limited to the pecuniary loss it may sustain through being deprived of the right to sell for use in the state of Oregon the particular type of pint containers which it manufactures for strawberries and raspberries. The record does not disclose any claim that containers of the type required for use in Oregon are not suitable for the purposes for which they are to be used.

The jurisdiction of the District Court was invoked upon the ground, among others, (R. 3) that:

> "The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.";

(R. 5):

> "That the right to continue to sell such tin-top berry baskets or cups to dealers in the State of Oregon is of great value to Plaintiff, far exceeding the sum of $3,000.00. That Plaintiff also sold a very large number of said baskets or cups to dealers in California for packing strawberries and raspberries for sale in Oregon."

The injury which it is alleged would result to appellant from the enforcement of the order is, so far as the record in this case discloses, peculiar to it alone.

Objection has been made by appellant to the statement that it is not licensed to do business in the state of Oregon. Appellant, however, does not contradict the statement. There is no presumption that it is so licensed.

Appellant is not an agency of the United States.

Nebbia v. New York, 291 U. S. 502, 525, 537, 539, 78 L. Ed. 940, 950, 957, 958:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts."
>
> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to to. proper legislative purpose, and are neither arbitrary

nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

"The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people."

The Bank of Augusta v. Earle, 13 Pet. 519, 590, 10 L. Ed. 309:

"The intimate union of these States, as members of the same great political family; the deep and vital interests which bind them so closely together; should lead us, in the absence of proof to the contrary, to presume a greater degree of comity, and friendship, and kindness towards one another than we should be authorized to presume between foreign nations. And when (as without doubt must occasionally happen) the interest or policy of any State requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end. * * *"

Pembina Consolidated Silver Min. Co. v. Pennsylvania, 125 U. S. 181, 189, 31 L. Ed. 653:

"* * * The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. * * *."

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 43, 44 L. Ed. 657, 663:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the state of Texas? This is the only inquiry, and it can not find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the powers of the state over them. * * *"

Hooper v. State of California, 155 U. S. 648, 652, 653, 39 L. Ed. 297, 299:

"The principle that the right of a foreign corporation to engage in business within a state other than that of its creation, depends solely upon the will of such other state, has been long settled, and many phases of its application have been illustrated by the decisions of this court. (Citing many cases.)

Whilst there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the Federal nature of its business. * * *"

Munday v. Wisconsin Trust Co., 252 U. S. 499, 503, 64 L. Ed. 684, 689:

"Where interstate commerce is not directly affected, a state may forbid foreign corporations from doing business or acquiring property within her borders except upon such terms as those prescribed by the Wisconsin statute. (Citing cases.)"

POINT II

The effect upon interstate commerce is too indirect to present a substantial Federal question.

Packer Corporation v. Utah, 285 U. S. 105, 76 L. Ed. 643, 648.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 518, 519, 46 L. Ed. 298, 306.

Savage v. Jones, 225 U. S. 501, 520, 524, 539, 56 L. Ed. 1182, 1184, 1189, 1191, 1197.

Hygrade Provision Co. v. Sherman, 266 U. S. 497, 503, 69 L. Ed. 402, 408.

The affidavit in support of application for interlocutory injunction (R. 26) states the amount of appellant's net receipts from shipments to Oregon during the years 1932 and 1933 to have been $6,699.62, after deducting freight charges, but does not disclose whether or not there were other expenses and costs of doing business to be deducted from profits derived from its sales in Oregon.

In *Packer Corporation v. Utah*, 285 U. S. 105, 76 L. Ed. 643, it was contended that a statute of Utah which prohibited the advertising of tobacco on billboards violated the commerce clause of the Federal constitution because it operated to prevent the display of posters shipped from another state. It was held (p. 111, U. S. Rep.; 648 L. Ed.) that:

> "* * * So far as the posters are concerned, assuming them to be articles of commerce, compare Charles A. Ramsay Co. v. Associated Bill Posters, 260 U. S. 501, 511 67 L. Ed. 368, 370, 43 S. Ct. 170, the statute is aimed, not at their importation, but at their use when affixed to billboards permanently located in the state. Compare Browning v. Waycross, 233 U. S. 16, 22, 23, 58 L. Ed. 828, 832, 833, 34 S. Ct. 578; General R. Signal Co. v. Virginia, 246 U. S. 500, 510, 62 L. Ed. 854, 858, 38 S. Ct. 360. * * *"

No person is prohibited from purchasing appellant's containers or from shipping them into the state of Oregon in original packages. The regulations do not apply to such containers until after the original packages have been broken. They are not then in interstate commerce.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 519, 46 L. Ed. 306:

"* * * The interference with the commercial power of the general government, to be unlawful, must be direct, and not the merely incidental effect of enforcing the police powers of a state. New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 439, 39 L. Ed. 1043, 1045, 15 Sup. Ct. Rep. 896; Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953, 17 Sup. Ct. Rep. 532."

Savage v. Jones, 225 U. S. 524, 525, 56 L. Ed. 1191:

"But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not, invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority. * * *"

Hygrade Provision Co. v. Sherman, 266 U. S. 503, 69 L. Ed. 408:

"2. Lewis & Fox Company is a Massachusetts corporation conducting a general provision supply business, including the shipment and sale of original packages into and within the state of New York. It is this situation which forms the basis of the contention that the commerce clause is violated. It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce. Sligh v. Kirkwood, 237 U. S. 52, 60, 61, 59 L. Ed. 835, 838, 839, 35 Sup. Ct. Rep. 501; Savage v. Jones, 225 U. S. 501, 524-526, 56 L. Ed. 1182, 1191, 1192, 32 Sup. Ct. Rep. 715."

It is respectfully submitted that this appeal should be dismissed upon the grounds that the enforcement of the statutes and orders complained of will not result in depriving appellant of its property without due process of law; deny it the equal protection of the laws; abridge any privileges or immunities of appellant; create a monopoly in favor of Oregon manufacturers, nor will they directly interfere with and impose unlawful burdens on the interstate commerce of appellant, or otherwise affect interstate commerce to such extent as to present a substantial Federal question.

Without waiver of the objections and grounds hereinbefore stated, appellees further urge:

POINT III

No monopoly is created in favor of Oregon manufacturers and against appellant.

McGoun v. Illinois, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 542, 75 L. Ed. 1248, 1258.

The statutes and orders complained of do not deny to foreign corporations any privileges or immunities that are not denied to domestic corporations under the same circumstances. Appellant is privileged to manufacture and sell for use in the state of Oregon the same type of containers that Oregon corporations may manufacture and sell.

There is nothing in the record of this case to support appellant's contention that the purpose of the statute is not to promote the general welfare of the state or that it is to protect domestic manufacturers of containers from competition by manufacturers of other types of containers.

The orders contain no specifications as to the material to be used in manufacturing containers. If it be true that the type of containers standardized can only be manufacturered from material obtainable in the Northwest, and advantage may result to manufacturers whose plants are located nearer to the raw material than others, that does not create a monopoly. Hardship, inconvenience or increase in cost of manufacturing does not constitute denial of privileges or immunities.

McGoun v. Illinois, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042.

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 542, 75 L. Ed. 1248, 1258.

POINT IV

The statutes and orders constitute a reasonable exercise of the police power.

Pacific States Box & Basket Co. v. Gehlhar et al., 9 Fed. Supp. 341, 342.

Detweiler v. Welch, 46 Fed. (2d) 75.

Marshall et al. v. Department of Agriculture, (Idaho, 1927) 258 Pac. 171.

Mattei y. Hecke, 99 Cal. 747, 279 Pac. 470.

Ex parte Fujii, 189 Cal. 55, 207 Pac. 537.

Detweiler v. Welch, 46 Fed. (2d) 75:

"The regulation of the marketing of farm and other products of a state where the same enter largely the local and interstate trade has been recognized as a legitimate exercise of the police power of the state, provided such regulation is not in conflict with an act of Congress or a regulation adopted in pursuance of such an act. Sligh v. Kirkwood, supra; Standard Stock Food Co. v. Wright, 225 U. S. 540, 32 S. Ct. 784, 56 L. Ed. 1197. A similar act of the Legislature of the State of Idaho was held by the supreme court of that state to be a valid exercise of the police power of the state. Marshall et al. v. Department of Agriculture et al., 44 Idaho, 440, 258 P. 171.

The act was designed to promote the general welfare of the industry which in turn would promote the general welfare of the state. * * *"

In *Marshall et al. v. Department of Agriculture*, 44 Ida. 440, 258 Pac. 171, the supreme court of Idaho sustained a statute authorizing the department of agri-

culture to promulgate rules, regulations and standards of marketing, branding and packing of farm products as defined by the act, requiring that the same when packed in receptacles and sold or offered for sale within the state be branded according to the standards as laid down by the department, and that such products when so packed and branded conform to such standards, and making violation of such requirements a misdemeanor, excepting therefrom such products when to be consumed or to be used in manufacturing purposes wholly within the state.

Ex parte Fujii, 189 Cal. 55, 207 Pac. 537. Fujii was arrested for unlawfully, feloniously, maliciously and wilfully selling, offering for sale and exposing for sale certain strawberries in containers holding less than one dry pint, to wit, one-half dry pint, contrary to the force and effect of a statute. Section 7 of the statute provided:

> "Sec. 7. Standard packages are hereby established as follows: * * *
>
> (2) Standard berry baskets, dry pint containing an interior capacity of approximately thirty-three and six-tenths cubic inches and dry one-half pint containing interior capacity of approximately sixteen and eight-tenths cubic inches; provided, that the standard basket for strawberries shall be the dry pint."

Section 14 of the act made it unlawful for any person

> "* * * to pack or cause to be packed for sale, or shipment, import, sale, offer for sale or deliver for shipment, any of the fresh fruits, nuts or vegetables specified in this act that do not conform to the standards herein provided."

It also made it unlawful to prepare, sell or offer for sale, a deceptive pack of fresh fruits, fresh vegetables, etc., or to mislabel any package of such fruits, nuts or vegetables. The ground upon which the classification was upheld was that it was a matter of common observation and knowledge that strawberries are, as a rule, much larger than the other varieties of berries referred to and less uniform in size and form, especially in the larger varieties.

> "It is also a matter of common observation and knowledge that strawberries cannot be placed as compactly in containers as other varieties of berries can without rendering them liable to crushing, with the consequence of their speedy degeneration and decay."

The container adopted by Oregon as standard is wider and shallower than the container manufactured by appellant, and its sides are perpendicular, whereas the sides of the container manufactured by appellant slope outward from the bottom.

Section 18-2902, Oregon Code 1930, is a legislative finding that it is proper and necessary in order to protect, further and develop the horticultural interests of the state of Oregon, that official standards for containers of horticultural products be promulgated. For that purpose the Department of Agriculture was authorized and empowered to conduct an investigation and public hearing, and fix and promulgate such standards.

The following statement is taken from the opinion of the trial court (R. 31):

> "The containers are so unlike in design, strength and material used that it requires skill and experience in

the handling and shipping of fruit to compare intelligently their respective advantages. It is presumed that the authorized legislative agency fully and fairly considered all the facts relating to the merits of the containers manufactured by plaintiff, as well as those adopted as the standards, and its determination as culminate in the orders was a finding that the standards so fixed were better adapted to carry out the beneficial objects of the legislation."

Circular No. 8, issued August, 1927, revised May, 1930, United States Department of Agriculture, Washington, D. C., relating to national standards for farm products, treats of the development of standards for farm products and of the necessity for the adoption and enforcement of such standards in order to promote the public welfare. Extracts from same, omitting illustrations, are annexed hereto as Appendix A.

United States Department of Agriculture Farmers Bulletin No. 1579, issued April, 1929, revised 1934, shows in some detail the extent to which standard containers for vegetables and fruits have been adopted by the several states. Extracts from same omitting illustrations, are hereto annexed as Appendix B.

POINT V

The statutes and orders in question do not conflict with Federal regulations.

Oregon-Washington Railroad & Navigation Co. v. Washington, 270 U. S. 87, 101, 70 L. Ed. 482, 488.

Mintz v. Baldwin, 289 U. S. 346, 350, 351, 77 L. Ed. 1245, 1249.

Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57, 60, 78 L. Ed. 1123, 1126.

Packer Corporation v. Utah, 285 U. S. 105, 76 L. Ed. 643.

39 Stat. 673, § 1; § 252, Title 15, U. S. C. A. 45 Stat. 385, § 2; § 257a, Title 15, U. S. C. A.

In addition to the acts of 1912 and 1915, fixing standards for barrels, the acts of Congress fixing standards for containers of fruits and vegetables are: Act of August 31, 1916, Chap. 426, Sec. 1, 39 Stat. 673, and Act of May 21, 1928, Chap. 664, Sec. 2, 45 Stat. 685.

The act of August 31, 1916, Chap. 426, Sec. 1, 39 Stat. 673 (§ 252, Title 15, U. S. C. A.), is hereto attached as Appendix C.

Section 2 of the Act of 1928, Chap. 664, Sec. 2, 45 Stat. 685 (§ 257a, Title 15, U. S. C. A.), is hereto attached as Appendix D.

Section 5 of 45 Stat. 686, Section 257d of Title 15, U. S. C. A., is hereto attached as Appendix E.

Oregon-Washington R. R. & Nav. Co. v. Washington, 270 U. S. 101, 70 L. Ed. 488:

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state can not interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.
>
> Cases of the latter type are the Southern R. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 Sup. Ct. Rep. 140; Northern P. R. Co. v. Washington, 222 U. S. 370, 378, 56 L. Ed. 237, 239, 32 Sup. Ct. Rep. 160; Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co., 226 U. S. 426, 435, 57 L. Ed. 284, 287, 46 L. R. A. (N. S.) 203, 33 Sup. Ct. Rep. 174; Erie R. Co. v. New York, 233 U. S. 671, 681, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, 34 Sup. Ct. Rep. 756, Ann. Cas. 1915D, 138; and Missouri P. R. Co. v. Stroud, 267 U. S. 404, 69 L. Ed. 683, 45 Sup. Ct. Rep. 243."

Congress has enacted statutes fixing dimensions for containers of certain agricultural and horticultural products. As to pint containers of berries it has fixed standards as to cubic contents, but not of dimensions.

Congress has legislated to the extent that standards fixed by it are suitable for use in the several states, but has left to individual states the adoption of other standards not in conflict with Federal standards as they may be required by conditions existing in the individual states.

Mintz v. Baldwin, 289 U. S. 346, 350, 351, 77 L. Ed. 1245, 1249:

"• • • Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order. The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear. Atchison, T. & S. F. R. Co. v. Railroad Commission, 283 U. S. 380, 391, 75 L. Ed. 1128, 1136, 51 S. Ct. 553; Carey v. South Dakota, 250 U. S. 118, 122, 63 L. Ed. 886, 888, 39 S. Ct. 403; Savage v. Jones, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 S. Ct. 715; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 623, 42 L. Ed. 878, 881, 18 S. Ct. 488."

Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 60, 78 L. Ed. 1126:

"• • • The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect of the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 290, 58 L. Ed. 1312, 1317, 34 S. Ct. 829. Cf. Napier v. Atlantic Coast Line R. Co. v. Georgia, 272 U. S. 605, 71 L. Ed. 432, 47 S. Ct. 207. The purpose exclusively to regulate need not be specifically declared. New York C. R. Co. v. Winfield, 244 U. S. 147, 61 L. Ed. 1045, 37 S. Ct. 546, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, 14 N. C. C. A. 680. But ordinarily such intention will not be implied unless, when fairly interpreted, the Federal measure is plainly inconsistent with state regulation of the same matter. Illinois C. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 1279."

POINT VI

The burden is upon appellant to show that the statutes and orders exceed the constitutional power of the state in the particulars in which they apply to it.

Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. Ed. 1155, 1160.

Armour & Co. v. North Dakota, 240 U. S. 510, 513, 60 L. Ed. 771, 774.

Union Pacific R. R. Co. v. United States (Sinking Fund cases), 99 U. S. 700, 718, 25 L. Ed. 496, 501.

Livingston Co. v. Darlington, 101 U. S. 407, 410, 25 L. Ed. 1015, 1017.

Price v. Illinois, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405.

Hebe Co. v. Shaw, 248 U. S. 297, 303, 63 L. Ed. 255, 259.

Schmidinger v. Chicago, 266 U. S. 578, 587, 588, 57 L. Ed. 364, 368.

Powell v. Pennsylvania, 127 U. S. 678, 683, 686, 32 L. Ed. 253, 256, 257.

Hardware Dealers Mutual Fire Insur. Co. of Wisconsin v. Glidden Co., 284 U. S. 151, 158, 76 L. Ed. 214, 219.

Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725.

It is appellant's contention that if the containers manufactured by it are as good for the purposes for which such containers are used as those required by the orders of the Department of Agriculture, the orders and the law pursuant to which they were adopted are invalid.

Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. Ed. 1155, 1160:

"• • • Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 562, 55 L. Ed. 328, 336, 31 Sup. Ct. Rep. 259; German Alliance Ins. Co. v. Lewis, 233 U. S. 389, ante, 1011, 34 Sup. Ct. Rep. 612."

Armour & Co. v. North Dakota, 240 U. S. 510, 513, 60 L. Ed. 771, 774:

"• • • We said but a few days ago that if a belief of evils is not arbitrary, we can not measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury, but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws. • • •"

Union Pacific R. R. Co. v. United States (Sinking Fund Cases), 99 U. S. 700, 718, 25 L. Ed. 496, 501:

"• • • Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government cannot encroach on the domain of another

without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Livingston Co. v. Darlington, 101 U. S. 407, 410, 25 L. Ed. 1015, 1017:

"In determining whether the General Assembly of Illinois has transgressed the fundamental law of that State, we recall what this court said in Fletcher v. Peck, 6 Crench, 128, where it became our duty to consider whether a statute of Georgia was in conflict with its Constitution.

'The question,' said Chief Justice Marshall, 'whether a law be void for its repugnancy to the Constitution is, at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers and its Acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of the incompatibility with each other.'

The language was cited with approval in R. R. Co. v. Smith, 62 Ill. 268, where the Supreme Court of Illinois added:

'Enough has been cited to show the firm position of the judiciary, that the courts ought not and, in justice to the rights of a co-ordinate department of the State Government, can not, declare a law to be void without a strong and earnest conviction, divested of all reasonable doubt, of its invalidity.' Lane v. Dorman, 4 Ill. (3 Scam.) 238; People v. Marshall, 6 Ill. (1 Gilm.), 672."

Price v. Illinois, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405. In this case the plaintiff offered evidence that the canning compound involved was not injurious to health or to the human system, which evidence was re-

jected and the defendant's excepted. In that case the court said:

> "• • • It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided. • • •"

Hebe Co. v. Shaw, 248 U. S. 297, 303, 63 L. Ed. 255, 259, involved the question of whether or not a food product composed of condensed skimmed milk and cocoanut oil was injurious to health. The court said:

> "• • • If the character or effect of the article, as intended to be used 'be debatable, the legislature is entitled to 'ts own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, 'upon the issue which the legislature has decided.' "

Schmidinger v. Chicago, 266 U. S. 578, 587, 588, 57 L. Ed. 364, 368. This involved the validity of an ordinance of the city of Chicago fixing weight standards for loaves of bread. The court said:

> "• • • This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred. Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. Ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U. S. 207, 233, 48 L. Ed. 148, 158, 24 Sup. Ct. Rep. 124; McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 29 Sup. Ct. Rep. 206."

Powell v. Pennsylvania, 127 U. S. 678, 683, 686, 32 L. Ed. 253, 256, 257:

"It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court can not say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. 'Every possible presumption,' Chief Justice Waite said, speaking for the court in Sinking Fund Cases, 99 U. S. 718 (25:501) 'is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.' See also Fletcher v. Peck, 10 U. S. 6 Cranch. 128 (3:175); Dartmouth College v. Woodward, 17 U. S. 4 Wheat. 518, 625 (4:629,656); Livingston County v. Darlington, 101 U. S. 407 (25:1015).

Page 257:

"• • • The Legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manu-

> facturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the Legislature, or to the ballot-box, not to the judiciary. The latter can not interfere without usurping powers committed to another department of government."

Hardware Dealers Mutual Fire Insurance Company of Wisconsin v. Glidden Company, 284 U. S. 151, 158, 76 L. Ed. 214, 219:

> "The record and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163, 51 S. Ct. 130; see Standard Oil Co. v. Marysville, 279 U. S. 582, 584, 73 L. Ed. 856, 859, 49 S. Ct. 430; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 397, 71 L. Ed. 1115, 47 S. Ct. 630. We can not assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded."

The object in providing standards for containers of horticultural products is declared in Section 18-2902, Oregon Code 1930, to be "to promote, protect, further and develop the horticultural interests of the state".

It is to be assumed that the legislature determined the necessity for the adoption of regulations providing such standards, and it is stated in the order of April 15, 1933 (R. 10-13), that the proceedings were conducted as provided by statute.

The adoption of some definite standard for containers was necessary if the packing, handling and marketing of such products in any kind of container the person interested might adopt is to be prevented.

There is nothing in the record of this case to sustain appellant's contention that the administrative officers acted in an arbitrary or unreasonable manner, or that in selecting the type of container fixed by the order they had any intention of discriminating against appellant.

The burden is upon appellant to show, not only that the type of container manufactured by it is better for the purposes designated by the legislature than the one fixed and promulgated by the administrative officers but also that the selection of another type was arbitrary and unreasonable.

Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725.

The advantages stated in Appendices A and B of this brief to result from the fixing of standards for containers are matters of common knowledge. The exhibits are published by a department of the United States government specially informed in such matters and qualified by training and experience to discuss same.

POINT VII

The record does not rebut the presumption that constitutional powers have not been exceeded.

Borden's Farm Products Co. v. Baldwin, 79 L. Ed. Advance Opinions, 127-198.

Appellant apparently relies upon the opinion of this court in *Borden's Farm Products Co. v. Baldwin*, 79 L. Ed. Advance Opinions, 127-198, Supreme Court Law Edition Advance Opinions 1934-1935, as having overruled former decisions holding that there is a presumption that an order of an administrative board or official is constitutional and valid.

In this connection we quote the following from the opinion in that case, page 132, headnote No. 2:

"• • • In view of the peculiar nature and effect of this provision, and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court, unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right. Accordingly, we pass to the consideration of the various grounds that are suggested as adequate support for the legislative action."

Also page 135, headnote 4:

"• • • When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof,

that the action is arbitrary. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 397, 71 L. Ed. 1115, 1120, 47 S. Ct. 630; Lawrence v. State Tax Commission, 286 U. S. 276, 283, 76 L. Ed. 1102, 1107, 52 S. Ct. 556, 87 A. L. R. 374. The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (Smith v. Cahoon, 283 U. S. 553, 567, 75 L. Ed. 1264, 1269, 51 S. Ct. 582) or that may appear by facts admitted or proved. Southern R. Co. v. Greene, 216 U. S. 400, 417, 54 L. Ed. 536, 541, 30 S. Ct. 287, 17 Ann. Cas. 1247; Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, 85, 69 L. Ed. 169, 177, 45 S. Ct. 12; Concordia F. Ins. Co. v. Illinois, 292 U. S. 535, 549, 78 L. Ed. 1411, 1420, 54 S. Ct. 830. Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. Lindsley v. Natural Carbonic Gas Co. 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160, supra; Rast v. Van Deman & L. Co. 240 U. S. 342, 60 L. Ed. 679, 36 S. Ct. 370, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; Radice v. New York, 264 U. S. 292, 68 L. Ed. 690, 44 S. Ct. 325; Ohio ex rel. Clarke v. Deckebach, 274 U. S. 392, 71 L. Ed. 1115, 47 S. Ct. 630, supra; Ohio Oil Co. v. Conway, 281 U. S. 146, 74 L. Ed. 775, 50 S. Ct. 310; State Tax Comrs. v. Jackson, 283 U. S. 527, 75 L. Ed. 1248, 51 S. Ct. 540, 73 A. L. R. 1464, 75 A. L. R. 1536. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determination upon evidence, so that conclusions shall not be reached without adequate factual support."

POINT VIII

It is not essential to the validity of the orders that they be supported by findings.

Borden's Farm Products Co. v. Baldwin, 79 Law. Ed. Advance Opinions, 127, 135.

Wichita R. R. & L. Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. Ed. 124.

Mahler v. Eby, 264 U. S. 32, 44, 68 L. Ed. 549, 556.

Southern Railway Co. v. Virginia, ex rel. Shirley, 290 U. S. 190, 197, 78 L. Ed. 260, 266.

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. Adv. Opinions, 223, 238.

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. Ed. 240, 246.

Appellant contends that the orders of the Department of Agriculture are invalid under rules applied by this court in *Witchita R. R. & L. Co. v. Public Utilities Commission*, 67 L. Ed. 124, 130; *Mahler v. Eby*, 264 U. S. 32, at 34, 68 L. Ed. 549, at 556; *Borden's Farm Products Co. v. Baldwin*, 79 L. Ed. Advance Opinions, 130, at 135; *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. Advance Opinions, 223, 238, 55 S. Ct. 241, and *Southern Railway Co. v. Virginia ex rel. Shirley*, 290 U. S. 190, at 197, 78 L. Ed. 260, at 266, 54 S. Ct. 148.

Appellees submit that the cases relied upon by appellant do not support its contention.

We quote from the opinion in *Wichita R. R. & L. Co. v. Public Utilities Commission*, page 58, U. S. Rep., 130 L. Ed., as follows:

> "The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that, after full hearing and investigation, the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory, or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that, for lack of such a finding, the order in this case was void.
>
> This conclusion accords with the construction put upon similar statutes in other states. State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co., 291 Ill. 209, P. U. R. 1920C, 640, 125 N. E. 891; State Public Utilities Co. v. Baltimore & O. S. W. R. Co. 281 Ill. 405, P. U. R. 1918B, 655, 118 N. E. 81. Moreover it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith, to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent

to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

Mahler v. Eby, 264 U. S. 32, at 44, 68 L. Ed. 549 at 556:

"* * * It is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfilment of that condition should appear in the record of the act. In Wichita R. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 67 L. Ed. 124, 43 Sup. Ct. Rep. 51, a statute of a state required that a public utility commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case, made after a hearing, and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute, but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to execute agencies, we said (p. 59):

'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.'"

We quote from appellant's brief, page 17, as follows:

"While there is a rebuttable presumption of fact as to the constitutionality of an act of the legislature (Borden's

> Farm Products Co. v. Baldwin, 79 L. Ed. Ad. Op. 130), there is no such presumption of constitutionality or validity of an order of an administrative official."

The quotation from *Southern Railway Co. v. Virginia ex rel. Shirley*, on page 16 of appellant's brief, reads as follows:

> "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the Legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

We do not find anything in the opinion referred to more nearly supporting appellant's contention than its quotation therefrom above referred to. The Virginia act involved in *Southern Railway Company v. Virginia ex rel.*, supra, was held to be invalid for the reason that it permitted the Highway Commissioner, an executive officer—without notice or hearing—to abolish any designated grade crossing and construct an overhead when, in his opinion, necessary for public safety and convenience. We quote from the opinion in that case as follows (p. 197, U. S. Rep., 266 of L. Ed.):

> "* * * But if we assume that a state legislature may determine what public welfare demands and by direct command require a railway to act accordingly, it by no means follows that an administrative officer may be empowered, without notice or hearing, to act with finality upon his own opinion and ordain the taking of private property. There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public."

(P. 199, U. S. Rep., 266 L. Ed.):

"The infirmities of the enactment are not relieved by an indefinite right of review in respect of some action spoken of as arbitrary. Before its property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts. This has not been accorded. The judgment below must be reversed. The cause will be remanded for further proceedings not inconsistent with this opinion."

On page 16 of its brief, appellant quotes the following from *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. Adv. Ops. 223, 238, 55 S. Ct. 241:

"If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determination of facts, those determinations must be shown."

We quote further from the opinion in that case as follows (p. 238):

"• • • When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. • • •"

In *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394, 56 Law. Ed. 240, 246, this court stated the rule which appellees have understood to be applicable to the instant case:

"The remaining contention is that the act is repugnant to the state Constitution because it attempts to delegate to the board of agriculture the exercise of legislative powers. The legislative requirement was that the illuminating oils furnished in North Carolina should be safe, pure, and afford a satisfactory light, and it was left to the board of agriculture to determine what oils would measure up

to these standards. We think a sufficient primary standard was established, and that the claim that legislative powers were delegated is untenable. Buttfield v. Stranahan, 192 U. S. 492, 48 L. Ed. 534, 24 Sup Ct. Rep. 349; Union Bridge Co. v. United States, 204, U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. Rep. 367; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 Sup. Ct. Rep. 616; United States v. Grimaud, 220 U. S. 506, 55 L. Ed. 563, 31 Sup. Ct. Rep. 480."

POINT IX

The contention that the statutes involved constitute an unlawful delegation of legislative authority to administrative officers is not open to consideration by this court, for the reason that it was not raised in the court below, nor assigned as error in this court.

Rule 13, paragraph 9, Rules of U. S. Supreme Court.

Appellant's original contentions are set out on pages 8 and 9 of its brief.

Appellant adopted its assignment of errors and represented that the whole of the record as filed is necessary for the consideration of the case (R. 42).

Neither the assignment of errors nor any other part of the record contains a statement that appellant will rely upon the point now presented and urged in its brief, page 50, that:

"III. The statute, under the authority of which the challenged orders were made, constitute an unlawful delegation of authority to administrative officials."

In view of the rule that the court at its opinion may notice a plain error not assigned or specified, appellees, without waiving their objection to consideration of the point by this court, respectfully submit:

POINT X

There has been no unlawful delegation of legislative power in connection with the issuance of the orders complained of in this case.

Van Winkle v. Fred Meyer, Inc., Vol. 21, No. 3, Advance Sheets, Cases Decided in the Supreme Court of the State of Oregon, 85, 89, 90, 91, 94.

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. Adv. Ops., 223, 232, 235, 236.

Schechter v. United States, 79 L. Ed. Adv. Ops., 888, 895, 901.

Appellant argues that the statutes and orders are invalid because the authority conferred by section 18-2902, Oregon Code 1930, is only "to promote, protect, further and develop the horticultural interests of this state".

Said section is section 2 of chapter 57, General Laws of Oregon, 1923. The title of that act reads as follows:

> "An Act to authorize the Oregon state board of horticulture to fix and promulgate standards for all kinds of horticultural, viticultural and vegetable products and containers therefor; providing for inspection of such products and containers, and for the observance and enforcement of standards so fixed and promulgated, and repealing chapter 206, General Laws of Oregon, 1921."

The promotion of the general welfare of the state is, therefore, clearly within the purpose of the act as expressed in the title.

Although the main purpose in adopting standards for containers of horticultural products is primarily to promote, protect, further and develop the horticultural interests of the state, the adoption and enforcement of such standards also promotes the general welfare. The need of standardization of containers for agricultural and horticultural products has been long recognized and provided for by the Federal government and by the several states, and comes so clearly within the scope of the police power of the state as to no longer present an open question.

That appellant does not question the authority of the state under the police power to provide standards for containers of horticultural products, except as they relate to the dimensions of strawberry and raspberry containers, is indicated by the following statement taken from page 59 of its brief:

> "Appellant believes that the orders in question in so far as they relate to strawberry and raspberry containers and the supporting statutes should be declared unconstitutional and void."

The decision of the supreme court of Oregon in the case of *Van Winkle v. Fred Meyer, Inc.*, in so far as it relates to improper delegation of authority by the legislature, is based upon Article IV, section 1, of the Constitution of Oregon, which divides the powers of government into the executive, the administrative, and judicial departments, and provides that each of said departments is prohibited from exercising any of the powers conferred upon either of the others. This provision of the state constitution was not originally in-

voked by appellant, nor was a like provision of the Federal constitution.

The additional question thus presented will be discussed from the standpoint of whether or not the error now assigned relates to a question of power, and is therefore a plain error which may be considered by this court in the absence of an assignment.

The grounds upon which the Oregon statute was held invalid in the case of *Van Winkle v. Fred Meyer, Inc.*, supra, were, p. 89, Advance Sheets:

> "* * * to subject all persons engaged in the business or industry covered by the act to marketing agreements having the force and effect of law, whether they have assented thereto or not, for a violation of which their goods may be forfeited and they themselves become subject to criminal prosecution, against which, if the law is valid, they can make no defense. To accomplish that result, all that is necessary to be done is to have a substantial majority, measured in dollars or units of output, of the persons engaged in any particular line or branch of the industry or business covered by the act formulate or approve such an agreement and submit the same to the governor, who is bound to approve the agreement unless he finds that it has not been approved by such a majority or that its provisions are inequitable to the producers or contrary to the interests of the consumers or the general public. Under these provisions, a preponderant majority engaged in any particular line or branch of industry or business covered by the act may, with or without the assent of the others likewise engaged, fix the price of any commodity covered by the agreement and limit and restrict the amount which may be produced or sold. In granting these coercive and unrestrained powers to an indefinite and indeterminate group of persons, the act contains no limitation or restriction upon the exercise by them of the powers so conferred, nor does it prescribe any definite or intelligent rule, standard or guide by which their exercise of such powers is to be governed or their discretion con-

trolled, and leaves wholly to such majority the determination of whether there shall be a law at all and, if there is to be a law, what the terms thereof shall be."

After referring to Article 4, section 1, of the Constitution of Oregon, dividing the powers of government into the legislative, executive and administrative departments, and prohibiting each of said departments from exercising any of the powers conferred upon either of the others, the court said, page 90:

"* * * Under these provisions the legislature can not confer upon any person, officer, agency or tribunal the power to determine what the law shall be. * * *"

Page 91:

"Under the very terms of the act in question, there is to be no law fixing the price of any commodity or regulating its production or sale unless a preponderant majority engaged in its production or sale formulate an agreement and secure its approval by the governor. Under the specific directions of the act, when this has been done, the prices so fixed and the regulations so adopted are to become the law of the state, but if no agreement is entered into, then there is to be no law. This leaves wholly to persons outside of the legislature the power to determine whether there shall be a law at all and, if there is to be a law, what the terms of that law shall be. It is impossible to conceive of a more complete delegation of legislative power and, since the act contravenes the plain provisions of our constitution in that it attempts to make an unlawful and unauthorized delegation of legislative power, the act is unconstitutional and void. * * *"

Page 94:

"The further objection that this act is unconstitutional because it contains no standard or guide and prescribes no rule of law by which the powers conferred under the act are to be exercised must also be sustained. It is a fundamental principle of constitutional law that in delegating

> powers to an administrative body the legislature must prescribe some rule of law or fix some standard or guide by which the actions of that body, in administering the law, are to be governed and made to conform. Under this act, there is no rule of law, nor is there any standard or guide prescribed by which the persons to whom the powers are to be delegated are to be controlled or to which they must conform. On the contrary, it leaves to the uncontrolled will of a preponderant majority of any branch of the industry, covered by the act, the power to fix any price and to make any regulation and places no limitation upon the exercise by them of such powers and no limit beyond which they may go in the fixing of prices or in the making of regulations. In the formulation of the agreement, everything is to be left under the act to the unfettered and uncontrolled discretion of the preponderant majority.
>
> The act further provides that the agreement, when formulated and approved, shall be administered by a control board and prescribes that 'the duties and powers of such board shall be such as are specified for it in the marketing agreement or from time to time delegated to it by the governor or the state director of agriculture', and there is no limitation placed in the act as to what powers may be thus delegated, or as to what the control board may do."

Under this statute the function of the officers of the department of agriculture is to fix standards for purposes designated by the legislature and within limitations prescribed by the legislature.

At page 94 of the report in the case of *Van Winkle v. Fred Meyer, Inc.*, supra, the supreme court of Oregon quoted with approval the following excerpt from the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388 (79 L. Ed. 223, 55 S. Ct. 241):

> "The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of

details with which the national legislature can not deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

It is contended by appellant that the use of the words "authorized and empowered" in section 18-2902, Oregon Code 1930, makes it optional with the administrative officers whether or not they will adopt or promulgate any standards.

Among other cases referred to in appellant's brief as supporting its contention are *Panama Refining Co. v. Ryan*, 293 U. S. 388, 79 L. Ed. Ad. Ops. 233, 55 S. C. 241, and *Schechter v. United States*, 79 L. Ed. Adv. Ops. 888, 55 S. Ct. 837.

In the first case it was said, page 232, Advance Opinions, headnote 6:

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature can not deal directly. The Constitution has never been regarded as deny-

ing to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, can not be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

Page 235:

"Applying that principle, authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed, have constantly been sustained. Moreover, the Congress may not only give such authorizations to determine specific facts but may establish primary standards, devolving upon others the duty to carry out the declared legislative policy, that is, as Chief Justice Marshall expressed it, 'to fill up the details' under the general provisions made by the legislature. Wayman v. Southard, 10 Wheat. 1, 43, 6 L. Ed. 253, 262. In Buttfield v. Stranahan, 192 U. S. 470, 496, 48 L. Ed. 525, 535, 24 S. Ct. 349, the Act of March 2, 1897 (29 Stat. at L. 604, 605, chap. 358, U. S. C. title, 21 § 41) was upheld, which authorized the Secretary of the Treasury, upon the recommendation of a board of experts, to 'establish uniform standards of purity, quality, and fitness for the consumption of all kinds of teas imported into the United States.' The Court construed the statute as expressing 'the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality.' The Congress, the Court said, thus fixed 'a primary standard' and committed to the Secretary of the Treasury 'the mere executive duty to effectuate the

legislative policy declared in the statute'. 'Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.' See Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. Ed. 240, 245, 32 S. Ct. 152."

Page 236:

"The provisions of the Radio Act of (February 23), 1927 (44 Stat. at L. 1162, 1163, chap. 169, U. S. C. title 47, § 81), providing for assignments of frequencies or wave lengths to various stations, afford another instance. In granting licenses, the Radio Commission is required to act 'as public convenience, interest, or necessity requires'. In construing this provision, the Court found that the statute itself declared the policy as to 'equality of radio broadcasting service, both of transmission and of reception,' and that it conferred authority to make allocations and assignments in order to secure, according to stated criteria, an equitable adjustment in the distribution of facilities. The standard set up was not so indefinite 'as to confer an unlimited power'. Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co. 289 U. S. 266, 279, 285, 77 L. Ed. 1166, 1175, 1178, 53 S. Ct. 627, 89 A. L. R. 406."

We quote from the case of *Schechter v. United States*, Vol. 79, L. Ed. Adv. Ops., p. 895:

"We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the National Legislature can not deal directly. We pointed out in the Panama Ref. Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply."

Page 901:

"To summarize and conclude upon this point: § 3 of the recovery act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure.

Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, § 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in § 1.

In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered.

We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power."

In conclusion, appellees respectfully submit that the statutes and orders involved in this suit are within the police power of the state; that the orders were duly promulgated pursuant to and in the manner required by statutes of the state of Oregon. That if, however, the court is of the opinion that said statutes and orders, or either of them, are unconstitutional, they should not be set aside except upon the complaint of one to whom they directly apply.

I. H. VAN WINKLE,
Attorney-General of Oregon,

WILLIS S. MOORE,
Assistant Attorney-General of Oregon,

Counsel for Appellee.

APPENDIX A

Circular No. 8, Issued August, 1927; revised May, 1930, United States Department of Agriculture, Washington, D. C., National Standards for Farm Products, pp. 24, 25.

CONTAINERS FOR FRUITS AND VEGETABLES

Standard containers for marketing fruits and vegetables are of more interest to the average citizen than he generally realizes. He is at all times a consumer of some commodity and may be a grower or shipper of other commodities, a manufacturer of containers, or an official of a railroad, steamship line, or other carrier. As a consumer he is frequently defrauded by the substitution of short-measure packages at the full-measure price. The cost of marketing is increased by the greater expense of manufacturing a large number of styles and sizes by breakage in transit, which may be due to weak packages, to improper stowage, or to the difficulty of loading odd-sized containers.

Standardization means to the manufacturer that production is simplified and that he can concentrate on a few sizes, with consequent lowering of costs. To the carrier it means the elimination of many sizes that now complicate the problem of damage in transit, and it narrows the container problem to a few sizes for which standard strength specifications can be worked out and approved methods of stowing and bracing can be devised. The grower or shipper benefits by any action that lowers the cost of manufacture and tends to reduce breakage in transit. In addition, standard containers provide him with a definite basis of sale so far as the size of his package is concerned. He is thus relieved of unfair competition through use by his competitor of a short package.

Three Federal laws have made certain standard containers compulsory for the marketing of fruits and vegetables. These are the United States standard barrel act and the standard container acts of 1916 and 1928.

The first of these, the standard barrel act, passed in 1915, established the standard fruit barrel of 7,056 cubic inches and its subdivisions, and the standard cranberry barrel of

5,826 cubic inches and its subdivisions. The standard fruit and vegetable barrel, which is ordinarily supposed to contain 3 bushels, actually holds 9 quarts in excess of that quantity. In establishing this standard, theoretical considerations were laid aside and the same dimensions and capacity as those of the flour barrel were adopted. The standard cranberry barrel was designed to hold 100 pounds of cranberries. The subdivisions of both barrels are three-quarter barrel, one-half barrel, and one-third barrel. The standard barrel act is enforced by the Bureau of Standard of the United States Department of Commerce, and in those states that have legally adopted the Federal standard by the local sealer of weights and measures. The law has been reenacted by at least 17 states and by the District of Columbia.

Closely following the adoption of the standard barrel act, the standard container act of 1916 was passed in 1916. This legislation established three standard sizes of Climax or grape baskets of 2, 4, and 12 quarts capacity, and standard berry boxes and till baskets containing dry one-half pint, dry 1 pint, dry 1 quart, and multiples of the dry quart. A large number of unnecessary sizes of these containers was eliminated by this act, the reductions amounting to 82, 84, and 93 percent for berry boxes, till baskets, and Climax baskets, respectively. (Fig. 7.) This simplification of sizes has improved marketing conditions for the produce shipped in these containers because there is now no question as to the size of the containers. It works to the benefit of growers, shippers, and consumers. To the manufacturer it has meant a reduction in the number of forms necessary to supply his customers, the possibility of making up stock in advance of orders, and extension of his market, because the containers which he now makes are in use the country over.

The material benefits accruing from the standard container act of 1916 resulted in a demand for and the ultimate passage in 1928 of the second standard container act. This act fixes the standard sizes of hampers and round stave baskets, including the type known as "straight side" or "tub" baskets, and splint baskets. Nine standard sizes of hampers and round stave baskets are provided—⅛, ¼, ½, ⅝, ¾, 1, 1¼, 1½, and 2 bushels. Splint baskets are standardized in six sizes of 4, 8, 12, 16, 24, and 32 quarts capacity.

APPENDIX B

U. S. Department of Agriculture Farmers' Bulletin No. 1579, Containers Used in Shipping Fruits and Vegetables, issued April, 1929, revised 1934, pages 1, 2, 7, 8 and 9:

The containers used in shipping fruits and vegetables are of vital importance in the handling of these commodities. More than a million carloads of fruits and vegetables are shipped annually in the United States. The greater part of this produce is packed in containers of some sort. To package this great quantity requires more than one billion containers, representing an investment of several million dollars.

The containers used are of five types—baskets, crates, boxes, barrels, and sacks. The baskets used are of seven types—berry, till, hamper, round stave, straight side or tub, splint or market, and Climax or grape baskets. Crates and boxes have either panel or solid ends, and are made either of rotary-cut or of sawn material. The barrels are of three sizes—the standard fruit and vegetable barrel, the standard cranberry barrel, and the 4-bushel barrel. The fruit and vegetable barrels are of three types—stave, open-stave, and veneer. Sacks are generally made of jute, but may be made of cotton or other fibers.

The containers in use for shipping a given commodity may vary widely in different sections of the country. For the same kind of vegetable one section may use a basket, another a crate, a third a barrel, and a fourth a sack. The increase in the production of fruits and vegetables, the increase in carload shipments of these commodities, the development of producing sections, the introduction of new types of containers, the penetration into one section of types of containers popular in other sections, and the keen competition between many producing sections have served to stimulate interest on the part of farmers in the containers used throughout the country for the kinds of fruits and vegetables they grow and ship. It is impossible to mention all the different containers that may be used in different sections at various times. Some commodities are

shipped from individual sections in such small quantities that the use of no particular container has been developed, and whatever is handy is used. Again, fruits and vegetables taken into city markets by nearby farmers may move in a variety of containers. For instance, in one New England city spinach was found on the market in lettuce crates, egg cases, orange boxes, and hampers. In this bulletin an effort is made to mention the containers most favored by the important shipping sections.

Berries of all kinds are packed in one-half pint, pint, and quart baskets known as boxes or cups; crates are used only as secondary shipping containers for the berry boxes or cups. Six types of boxes are in use—the American, Hallock, Leslie, stitched tray, metal rim, and paper. Special crates have been developed to fit these types. Unfortunately, there is considerable variation in the dimensions of crates for particular types of boxes.

In the eastern section of the country the most popular type of box is the American. The crates generally used hold 24 pints, 24 quarts, and 32 quarts (figs. 8, 9, and 10). Sixty-pint and sixty-quart crates are used to some extent in the Eastern Shore and Norfolk sections. A crate holding 36 oblong pint cups is used in New Jersey and has become predominnant in Florida. Typical inside dimensions of the crates in most common use in the East are as follows:

Capacity and type of crate	Inside dimensions (inches)	Length of slat (inches)
24-pint	9 by 9 by 18	20
24-quart	11 by 11 by 22	24
32-quart nailed top	14¼ by 11 by 22	24
32-quart hinged top	14⅞ by 11 by 22	23⅛
36-oblong-pint	9 by 11 by 22	24

The American type of box is also used in a special container, known as a pony refrigerator, used in the shipment of early strawberries from southern Florida (figs. 11 and 12). This is a heavy case, usually holding eight 1-quart boxes or 150 oblong pints. The layers of boxes are separated by dividers

of the type used in the ordinary crates. Metal trays are placed in the center or in the top of the box, or both, to hold a supply of ice. Airtight covers are clamped on after the berries and ice are in place. These pony refrigerators are well adapted to long-distance express shipments when it is not possible to load full cars and when prices are high. An objection occasionally raised is that the ice pans sweat and allow water to drop on the berries, causing some injury. These refrigerators must be returned to the owner after being emptied.

On the Pacific coast only half-pint and pint berry cups are used. These are of three types—metal rim, stitched tray, and Hallock (fig. 13). The first two are used in California, a large part of the stiched trays being made of paper. The Hallock is used in Oregon and Washington. The half-pint berry cups are used mainly for shipping raspberries. The 24-pint crate is the most popular size for Hallocks; this crate is made in a number of different styles.

The following are dimensions of typical Pacific coast berry crates:

Capacity and type of crate	Inside dimensions (inches)	Length of slat (inches)
12-pint Hallock	3½ by 13¾ by 18	19¾
12-pint San Jose	2⅞ by 13½ by 18⅛	19½
12-pint Imperial Valley	3¾ by 13½ by 17	19
15-pint Los Angeles	3¾ by 13½ by 22¼	23
24-pint shallow Hallock	5⅛ by 16½ by 22¼	24½
24-pint deep Hallock	6 by 13¾ by 18⅜	19¾

APPENDIX C

39 Stat. 673, § 1; § 252, Title 15, U. S. C. A.:

"§ 252. Standard basket or container for small fruits and vegetables. The standard basket or other container for small fruits, berries and vegetables shall be of the following capacities, namely, dry one-half pint, dry pint, dry quart, or multiples of the dry quart.

(a) The dry half pint shall contain sixteen and eight-tenths cubic inches.

(b) The dry pint shall contain thirty-three and six-tenths cubic inches.

(c) The dry quart shall contain sixty-seven and two-tenths cubic inches."

APPENDIX D

45 Stat. 385, § 2; § 257a, Title 15, U. S. C. A.:

"§ 257a. Standard splint baskets. The standard splint baskets for fruits and vegetables shall be the four-quart basket, eight-quart basket, twelve-quart basket, sixteen-quart basket, twenty-four-quart basket, and thirty-two-quart basket, standard dry measure. For the purposes of this subdivision of this chapter a quart standard dry measure has a capacity of sixty-seven and two-tenths cubic inches.

(a) The four-quart splint basket shall contain two hundred and sixty-eight and eight-tenths cubic inches.

(b) The eight-quart splint basket shall contain five hundred and thirty-seven and six-tenths cubic inches.

(c) The twelve-quart splint basket shall contain eight hundred and six and four-tenths cubic inches.

(d) The sixteen-quart splint basket shall contain one thousand and seventy-five and twenty-one one-hundredths cubic inches.

(e) The twenty-four quart splint basket shall contain one thousand six hundred and twelve and eight-tenths cubic inches.

(f) The thirty-two quart splint basket shall contain two thousand one hundred and fifty and forty-two one-hundredths cubic inches."

APPENDIX E

Section 5 of 45 Stat. 686, sec. 257d, Title 15, U. S. C. A.:

"§ 257d. Violations; what constitutes; punishment; guaranty against prosecution. It shall be unlawful to manufacture for sale or shipment, to offer for sale, to sell, to offer for shipment, or to ship, hampers, round stave baskets, or splint baskets for fruits or vegetables, either filled or unfilled, or parts of such hampers, round stave baskets, or splint baskets that do not comply with this subdivision of this chapter: Provided, That this subdivision of this chapter shall not apply to Climax baskets, berry boxes, and till baskets which comply with the provisions of sections 251 to 256 of this title, and the regulations thereunder. * * *"

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SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1935.

Pacific States Box & Basket Company, Appellant, vs. S. T. White, et al.	Appeal from the District Court of the United States for the District of Oregon.

[November 18, 1935.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit was brought in the federal court for Oregon, in May, 1934, to enjoin enforcement of an order of the Department of Agriculture of that State, dated May 3, 1933, entitled "Standard Containers for Fruits and Vegetables".[1] The plaintiff, Pacific States Box & Basket Company, is a California corporation which manufactures there fruit and vegetable containers. The defendants are the Director of Agriculture and the Chief of the Division of Plant Industry, of Oregon. The jurisdiction of the District Court was invoked both on the ground of diversity of citizenship and on the ground that the order, and the statutes purporting to authorize it, violate rights of the plaintiff guaranteed by the Federal Constitution. The case was heard upon plaintiff's motion for a preliminary injunction and defendants' motion to dismiss the bill on the ground that it does not state facts sufficient to entitle the plaintiff to relief. The court denied the injunction and dismissed the bill. 9 F. Supp. 341.

Oregon Code of 1930, Secs. 18-2902 and 18-2903, as amended by Oregon Laws 1931, ch. 136, and 1933, ch. 225, authorize the Chief of the Division of Plant Industry, after investigation and public hearing and subject to the approval of the Director of Agriculture, to fix and promulgate "official standards for containers of horticultural products" "in order to promote, protect, further and develop the horticultural interests" of the State. After a standard has been prescribed, these statutes make it unlawful for anyone to pack for sale or transport for sale, or sell, the article in a container

[1] The same provision concerning containers for strawberries is incorporated also in an order dated June 1, 1933; and the prayer for an injunction extends likewise to that order.

unless it conforms to the standard. They make any violation of the order a misdemeanor, and charge the Director with the duty of enforcement.

The order challenged, so far as it prescribes containers for raspberries and strawberries, is:

"As provided for in sections 18-2902 and 18-2903, Oregon Code 1930, and chapter 136, Oregon Laws, 1931, a public hearing was held in Portland, Oregon, on the date of April 15, 1933, to consider standard containers for fruits and vegetables. Containers for the following fruits and vegetables were considered and recommended:

Raspberries.

Crate—24-pint hallocks, . . . Size of hallock, 2 x 5¼ x 5¼ inches outside measurements, bottom set up ¾ inch, inside depth 1¼ inches.

Strawberries.

Crate—24-pint hallocks, . . . Size of hallocks, 2½ x 4⅜ x 4⅜ inches outside measurements, bottom set up ¾ inch, inside depth 1¾ inches.

. . . the abovementioned containers are hereby declared to be standard for the designated fruits and vegetables and this order shall become effective on June 15, 1933. Provided, however, that persons now having on hand new containers or shooks for same not of standard sizes as hereby approved will be allowed an extension of time until January 1, 1934, in order to make use of such material."

A hallock is a type of rectangular till box with perpendicular sides and a raised bottom. It is usually made of rotary cut veneer, taken directly from spruce logs; but is sometimes made of paper or other material.

The plaintiff manufactures a type of container other than hallocks. Its type, which is also used for raspberries and strawberries, is known as tin-top or metal rim. It differs from the hallock both in shape and construction. In shape, it is more like a cup; its sides slope outward; and it has not the raised bottom. This cup is made from two thin strips of wood crossing each other to form the bottom of the container and then bent upward to form the sides, reinforced with a narrow metal strip to insure protection of the cup and its contents, as well as to insure uniformity of cubic measure. The plaintiff has for years sold a part of its product of tin-top cups to dealers in Oregon, for ultimate use as containers for raspberries and strawberries to be packed there.

The bill alleges "that the effect" of the order is to prevent the sale by plaintiff for use in Oregon of "the metal top variety of containers or cups with the solid bottom;" "because dealers who formerly purchased such baskets from Plaintiff have been warned by officials . . . that they would not be allowed to sell strawberries or raspberries in any container" other than that prescribed; that it has no facilities for manufacturing hallocks; and that, because of the expense of installing the requisite machinery and the cost of transporting the appropriate supplies to its plant, it is impracticable for it to arrange to make hallocks.

The claim is that, since the order prescribed hallocks as the only permissible type of container, its necessary effect is to exclude containers of the plaintiff's manufacture from use in Oregon, and, therefore, the order violates its rights: (a) Under the due process clause of the Fourteenth Amendment, because the order is arbitrary, capricious, and not reasonably necessary for the accomplishment of any legitimate purpose of the police power; (b) Under the equal protection clause of the Amendment, because the order grants a monopoly to manufacturers of hallocks; (c) Under the commerce clause, because the order imposes undue burdens on interstate commerce. The defendants insist that the order is an appropriate exercise of the police power of the State; does not create a monopoly; and does not burden interstate commerce. We think the defendants are right.

First. The power of a State to prescribe standard containers in order to facilitate trading, to preserve the condition of the merchandise, to protect buyers from deception, or to prevent unfair competition is conceded. Such regulation of trade is a part of the inspection laws; was among the earliest exertions of the police power in America; has been persistent; and has been widely applied to merchandise commonly sold in containers. See *Turner* v. *Maryland*, 107 U. S. 38, 51-54. Latterly, with the broadening of the field of distribution and the growing use of containers in the retail trade, the scope of the regulation has been much extended.

Plaintiff does not question the reasonableness of the standard so far as it prescribes the capacity of the box or basket. Its challenge is directed solely to the fixing of the dimensions and the form of the container. But to fix both the dimensions and the form may be deemed necessary in order to assure observance of the prescribed

capacity and to effect other purposes of the regulation. It may be that in Oregon, where hallocks have long been in general use,[1] buyers at retail are less likely to be deceived by dealers as to the condition and quantity of these berries if they are sold in containers of the prescribed form and dimensions. It is said that there are 34 other styles or shapes of berry basket in use somewhere in the United States. Obviously, a multitude of shapes and sizes of packages tends to confuse the buyer. Furthermore, the character of the container may be an important factor in preserving the condition of raspberries and strawberries, which are not only perishable but tender. A shallow container, like the hallock prescribed, may conceivably better preserve these fruits than the deeper cup which the plaintiff manufactures. A container with perpendicular sides, like the hallock, may conceivably preserve them better than a metal-rim cup with outward sloping sides. And, since the containers are to be packed and shipped in crates of 24, the berries may conceivably be better stowed where the fruit basket has the bottom set-up peculiar to the hallock, than if it had the flat bottom of the plaintiff's metal-rim cup. Considerations of this nature led the Colonies, the individual States, and Congress to prescribe for many articles not only the capacity, but the size and form of containers.[2]

Different types of commodities require different types of containers; and as to each commodity there may be reasonable difference of opinion as to the type best adapted to the protection of the public. Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and, if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern. We may enquire only whether it is arbitrary or capricious. That the requirement is not arbitrary or capricious seems clear. That the type of container prescribed by Oregon is an appropriate means for attaining permissible ends cannot be doubted.

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[1]See "Containers used in Shipping Fruits and Vegetables", U. S. Department of Agriculture, Farmers' Bulletin No. 1579 (1934) pp. 7-9.

[2]See Turner v. Maryland, 107 U. S. 38, notes pp. 51-54.

Second. The standard prescribed by the order does not conflict with any established by Congress. The Standard Baskets and Containers Act of May 21, 1928, c. 664, 45 Stat. 685, has no relation to the matter here under consideration. That statute deals solely with hampers, round stave, and splint baskets of capacity not less than one-eighth bushel. The Standard Baskets and Containers Act of August 31, 1916, c. 426, 39 Stat. 673, which in § 2 deals with containers for small fruits and vegetables, prescribes merely the capacity of the containers. It fixes the cubic contents for dry half-pint, pint, and quart. It makes no reference to the dimensions or form of the container; and has left to the individual States the adoption of the standards in these respects if deemed necessary. Compare *Savage* v. *Jones*, 225 U. S. 501; *Merchants Exchange* v. *Missouri*, 248 U. S. 365, 368; *Mintz* v. *Baldwin*, 289 U. S. 346, 350, 351.

Third. The charge that the order is void because it grants a monopoly to manufacturers of hallocks is unfounded. The plaintiff, and all others, are free to engage in the business, which, so far as appears, is not protected by patent or trademark and does not rest upon trade secrets. The business is not closely controlled; nor is it peculiar to Oregon. In 1933, at least 25 concerns were engaged in the United States in manufacturing hallocks. Less than one-fourth of them were located in Oregon and Washington.[3] Plaintiff asserts that the order excludes it from the Oregon trade since its plant cannot be equipped to manufacture hallocks except at a prohibitive cost; and that the spruce logs, the veneer of which is customarily used in making hallocks, is not obtainable except in the Pacific Northwest. Obviously these allegations afford no support to the charge of monopoly; among other reasons, because the order does not prescribe the material from which hallocks may be made. They are in fact made, to some extent, from material other than spruce veneer. Moreover, the grant of a monopoly, if otherwise an appropriate exercise of the police power, is not void as denying equal protection of the law. Compare *Slaughter-House Cases*, 16 Wall. 36; *Nebbia* v. *New York*, 291 U. S. 502, 529.

[3] See "Production and Carry-over of Fruit and Vegetable Containers for the Year 1933", U. S. Department of Agriculture, Bureau of Agricultural Economics, pp. 3, 7, 16, 19, 22; *ibid.* for 1934, pp. 2, 6. Compare U. S. Department of Agriculture, Farmers' Bulletin No. 1579, pp. 7-9.

Fourth. The order does not unduly burden interstate commerce. It is aimed, not at the importation or sale of other type of containers, but at their use in Oregon by packers of raspberries and strawberries, and the later transportation and sale of the packages. The prohibition of other types involved in prescribing the standard is non-discriminatory. It applies regardless of the origin of the containers. The plaintiff is a manufacturer of containers, not a packer or shipper of berries. It is not prohibited from shipping its tin-top containers into Oregon; nor from selling them there. The operation of the order is intrastate, beginning after the interstate movement of the containers has ceased, and after the original package has been broken. To sustain this contention of the plaintiff would be to hold that its containers, because of their origin, are entitled to immunity from the exercise of the state regulatory power. Compare *Packer Corporation* v. *Utah*, 285 U. S. 105, 111-112.

Fifth. Plaintiff contends that since the case was heard on motion to dismiss the bill, all allegations therein made must be accepted as true; and, among others, the charge that "there is no necessity for the particular orders relating to strawberries or raspberries" "based on considerations of public health, or to prevent fraud or deception, or any other legitimate use of the police power, and the particular container described . . . does not of necessity promote, protect, further or develop the horticultural interests of the State"; and that its necessary effect is "to grant a monopoly to manufacturers of the so-called hallocks." The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland*, 107 U. S. 38. When such legislative action "is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary." *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, 209. The burden is not sustained by making allegations which are merely the general conclusions of law or fact. See *Public Service Commission* v. *Great Northern Utilities Co.*, 289 U. S. 130, 136, 137. Facts relied upon to rebut the presumption of constitution-

ality must be specifically set forth. See *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440; *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251; *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163. A motion to dismiss, like a demurrer, admits only facts well pleaded. Compare *St. Louis, Kennett & Southeastern R. R.* v. *United States*, 267 U. S. 346, 349.

Sixth. It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police power attaches only to acts of legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every exertion of the police power, either by the legislature or by an administrative body, is an exercise of delegated power. Where it is by a statute, the legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the legislature. The question of law may, of course, always be raised whether the legislature had power to delegate the authority exercised. Compare *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. Compare *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 447. Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing as the statute required. It is contended that the order is void because the administrative body made no special findings of fact. But the statute did not require special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. Compare *Wichita Railroad & Light Co.* v. *Public Utilities Commission*, 260 U. S. 48, 58-59; *Mahler* v. *Eby*, 264 U. S. 32, 44; *Southern Ry. Co.* v. *Virginia*, 290 U. S. 190, 193, 194.

Seventh. It is argued that under the constitution of Oregon, its legislature was without power to delegate the authority to prescribe standard containers, citing *Van Winkle* v. *Fred Meyer, Inc.*, 21 Oregon (Advance Sheets) 85. This objection (which involves solely a question of state law) was not made below, was not discussed by the lower court, and is not included in the assignment of errors filed in this Court. We have no occasion to consider it. See Rule 27 (4); *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225; *Bradley* v. *Public Utilities Commission*, 289 U. S. 92, 96-7.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.